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ARBITRAL TRIBUNAL  
ESTABLISHED BY  
AGREEMENT OF OCTOBER 23, 1985

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**DISPUTE CONCERNING FILLETING WITHIN THE GULF OF ST. LAWRENCE  
BY THE FRENCH TRAWLERS REFERRED TO IN ARTICLE 4(b)  
OF THE FISHERIES AGREEMENT BETWEEN CANADA AND FRANCE  
OF MARCH 27, 1972**

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**COUNTER-MEMORIAL SUBMITTED BY CANADA**


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APRIL 22, 1986

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COUNTER-MEMORIAL SUBMITTED BY CANADA



## COUNTER-MEMORIAL SUBMITTED BY CANADA

### INTRODUCTION

1. This Counter-Memorial is filed in accordance with Article 6 paragraph 2(b) of the Arbitration Agreement between Canada and France signed at Paris on October 23, 1985.

2. The purpose of this Counter-Memorial is first, to rebut and correct the contentions made in France's Memorial and to demonstrate that France's position has no foundation in law; second, to supplement as necessary the considerations of fact and law set out in the Memorial submitted by Canada on February 22, 1986; and third, to reaffirm the arguments made by Canada in its Memorial.

3. The fact that a contention or allegation appearing in the French Memorial is not discussed in the present Counter-Memorial cannot be construed as an admission by Canada that such contention or allegation is correct or relevant, or that the facts on which it may be based are accurately presented or properly interpreted.



4.           Part I of this Counter-Memorial provides a brief review of the Canadian position and an outline of the Government of Canada's response to the French Memorial. Part II reviews the origins of the dispute and places the relevant events in proper perspective. Part III deals with the arguments made by France about its historic rights in the Gulf of St. Lawrence and about the interpretation of the 1972 Agreement. Part IV rebuts France's argument that Canada's authority in the Gulf is limited to the regulation of the fishery for conservation purposes only, as well as France's allegation of discrimination. Part V deals with France's contentions about the "évolution inéluctable" of filleting at sea and about Canada's policy regarding factory freezer trawlers, and points out that France has not demonstrated that the prohibition of LA BRETAGNE from filleting in the Gulf has any impact upon Saint-Pierre-et-Miquelon. Part VI provides a summary of principal conclusions. Part VII sets out Canada's submissions. An additional volume contains annexes to this Counter-Memorial.





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**PART I**

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**OVERVIEW**

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**A. Review of the Canadian Position**

5. The Government of Canada reaffirms its position as set out in its Memorial. This position is further developed in this Counter-Memorial and for the convenience of the Tribunal is briefly summarized below.

6. Canada has the exclusive right to regulate the fishery in the Gulf of St. Lawrence. France's rights derive solely from the 1972 Agreement. The primary purpose of that Agreement was to phase French vessels out of the Gulf fishery. As an exception, in light of Saint-Pierre-et-Miquelon's special situation as a neighbour of Canada, a Saint-Pierre-et-Miquelon trawler fleet was permitted to continue a limited fishery in the Gulf on an equal footing with Canadian trawlers, for the benefit of Saint-Pierre-et-Miquelon.

7. As Canadian vessels are prohibited from filleting at sea in the Gulf, Saint-Pierre-et-Miquelon vessels must abide by the same restriction. To allow LA BRETAGNE to operate as a factory freezer trawler in the Gulf when Canadians are not permitted to operate factory freezer trawlers there would accord Saint-Pierre-et-Miquelon vessels preferential, not equal, treatment. The operation of factory freezer trawlers would transform the Saint-Pierre-et-Miquelon Gulf fishery into something significantly different from the limited fishery intended by the Parties in 1972, and it would



defeat the very object of Article 4 of the 1972 Agreement by providing a benefit for metropolitan France, not Saint-Pierre-et-Miquelon.

**B. Outline of Canada's Response to the  
French Memorial**

8. The facts and arguments advanced by Canada in this Counter-Memorial will demonstrate that France's position as set out in its Memorial cannot be supported. In particular, Canada will rebut the French arguments in respect of the nature of the rights granted by the 1972 Agreement, of Canada's jurisdiction over the fishery in the Gulf of St. Lawrence, of the reasons for using factory freezer trawlers, of Canada's policy relating to such vessels, and of the impact of the prohibition of factory freezer trawlers in the Gulf of St. Lawrence upon the Saint-Pierre-et-Miquelon fishery under Article 4(b). Canada will provide a brief assessment of France's arguments in the subsequent paragraphs of this Part, and will rebut those arguments in more detail in the remainder of this Counter-Memorial.<sup>1</sup>

9. France seeks to interpret Article 4 of the 1972 Agreement in the light of its historic fishery in the Gulf as if the current Saint-Pierre-et-Miquelon fishery were a continuation of a French fishery of

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<sup>1</sup> In the course of its argument, France refers to several matters that have no bearing on this arbitration. Canada will, where appropriate, refer to these matters in order to rebut France's allegations.





earlier centuries.<sup>2</sup> Prior rights, however, cannot provide any support for France's position today. French fishing rights in the Gulf were renounced in the 1972 Agreement which superseded all previous treaties on the subject. The 1972 Agreement is the sole source of French rights in the Gulf.

10. Furthermore, the Saint-Pierre-et-Miquelon trawler fishery that began in the Gulf only in the 1960s is not the successor to a metropolitan French fishery of previous centuries. The true successor to any former French fishery in the Gulf is the metropolitan fleet, which is to be phased out of the Gulf in accordance with Article 3 of the 1972 Agreement. That Agreement is primarily a phasing-out agreement, with a special exception for the Saint-Pierre-et-Miquelon trawler fleet granted for reasons totally unrelated to France's historic fishery. This exception provides for that fleet to continue a limited fishery in the Gulf conducted for the benefit of Saint-Pierre-et-Miquelon, on an equal footing with Canadian trawlers.

11. The Gulf of St. Lawrence is treated by France as if it were subject to a Franco-Canadian condominium under which Canada can regulate France's fishery only for the purposes of conservation.<sup>3</sup> No such limitation on Canada's rights can be found in international law generally, in State practice, or under the 1972

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<sup>2</sup> French Memorial, pp. 62-63, para. 70.

<sup>3</sup> Id., p. 57, para. 65.



Agreement. The fishery in the Gulf of St. Lawrence, which is subject to the exclusive jurisdiction of Canada, may be regulated by Canada in accordance with social and economic as well as conservation objectives.

12. The only limit that the 1972 Agreement places on the scope of the regulatory authority of Canada within the Gulf of St. Lawrence is an obligation of non-discrimination. In making the allegation that the condition attached to the licence of LA BRETAGNE is discriminatory,<sup>4</sup> France carries a heavy onus of showing that there has been a violation of the equal footing rule of Article 4(b), or of the non-discrimination rule of Article 6. France has not discharged this onus, nor can it do so. There is no discrimination in the application to Saint-Pierre-et-Miquelon vessels of a prohibition applied to Canadian vessels.

13. France's claim that the use of factory freezer trawlers constitutes an "évolution inéluctable," and that Canada stands alone in refusing to recognize this, is in manifest contrast to the actual developments in the very fishing fleets referred to by France.<sup>5</sup> Factory freezer trawlers are used for reasons relating to distance, markets and species particular to each country. Their use is not essential for the modernization of a fishing fleet.

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<sup>4</sup> Id., p. 86-88, para. 103.

<sup>5</sup> Id., pp. 77-78, paras. 96-98.



14. France's contention that Canada's policy relating to factory freezer trawlers has been designed only to protect the shore-based processing industry in Canada<sup>6</sup> ignores the principal rationale for Canada's policies both in relation to the offshore fleet in general and to factory freezer trawlers in particular. Canada's management involves a broad framework of measures, of which the setting of quotas forms a part, designed to control demands on the resource. Canada's approach also reflects broader economic and social considerations applicable to the Gulf fishery.

15. Notwithstanding its allegation that the prohibition of filleting in the Gulf is designed to deprive Saint-Pierre-et-Miquelon of its right to fish under Article 4(b),<sup>7</sup> France has produced no evidence to demonstrate that this prohibition has any real impact on Saint-Pierre-et-Miquelon. Moreover, France has advanced no reason to show why it is necessary that factory freezer trawlers registered in Saint-Pierre-et-Miquelon should be able to operate in the Gulf.

16. There are two curious lacunae in France's Memorial. First, the equal footing principle in Article 4(b) receives practically no attention.<sup>8</sup> This is par-

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<sup>6</sup> Id., pp. 84-85, para. 101.

<sup>7</sup> Id., p. 90, para. 104.

<sup>8</sup> France's principal reference to equal footing is made to affirm that the Saint-Pierre-et-Miquelon trawlers are not limited to fishing in their tra-  
(Cont'd on next page)





ticularly striking in view of the fact that from the outset Canada has made clear to France the importance that equal footing has in that Article.<sup>9</sup> France's reticence is explained by the fact that it wants privileged treatment in the Gulf -- an exemption from the equal footing principle. Nowhere does France explain why it is legally entitled to such treatment, or even why such treatment is a practical necessity. In effect, France argues that to grant it equality of treatment with Canadian vessels, in accordance with Article 4(b), constitutes discrimination.

17. Second, the French Memorial treats the right to continue to fish under Article 4(b) as if it were a right granted to France generally. Only passing reference is made to the fact that this right arises under an article that was included because of the special situation of Saint-Pierre-et-Miquelon as a neighbour of Canada.<sup>10</sup> There is little indication in the French Memorial that the benefit of the article was intended for the inhabitants of Saint-Pierre-et-Miquelon and not for metropolitan France. Indeed, at times Saint-Pierre-et-Miquelon virtually disappears from the French Memorial, reflecting the fact that the real

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ditional areas. See French Memorial, p. 49, para. 55; p. 50, para. 55; p. 53, para. 61; p. 57, para. 65. In paragraph 103 at page 88, France incorrectly treats equal footing as if it implied equality between Saint-Pierre-et-Miquelon trawlers and metropolitan and other foreign vessels.

<sup>9</sup> Canadian diplomatic note No. 237 of February 4, 1985. Canadian Memorial, Annex 6.

<sup>10</sup> French Memorial, p. 54, para. 62.



interests involved in the operation of factory freezer trawlers out of Saint-Pierre-et-Miquelon are not those of the islands or of their inhabitants.

18. France's failure to address in its Memorial the central question of equal footing, or the fact that Article 4(b) was designed to benefit Saint-Pierre-et-Miquelon, means that after the first round of these proceedings France has still to deal with the essential issues in this case.



## PART II

### THE ORIGINS OF THE DISPUTE

19. France's account of how the present dispute arose<sup>11</sup> is invoked as support for its argument that the 1972 Agreement has not been complied with.<sup>12</sup> In doing so France calls into question Canada's purpose in prohibiting LA BRETAGNE from operating as a factory freezer trawler in the Gulf.<sup>13</sup> In this Part, the Government of Canada will place the relevant events in proper perspective and demonstrate that France has neither provided an adequate picture of the origins of this dispute nor drawn the correct conclusions from the relevant events.

20. On November 30, 1984 France applied to Canada for licences for French vessels for the 1985 fishing season<sup>14</sup> in Canadian waters including NAFO Divisions 4R and 4S within the Gulf (see Figure 1). The following six vessels were designated as registered in Saint-Pierre-et-Miquelon: CROIX-DE-LORRAINE, GOELETTE, LA NORMANDE, LA BRETAGNE, ISLANDE IV and ZELANDE II. The

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<sup>11</sup> Id., Introduction, pp. 1-12, paras. 1-16.

<sup>12</sup> Id., p. 82, para. 100.

<sup>13</sup> Id., p. 82, para. 101. See also p. 90, para. 104.

<sup>14</sup> A copy of the application is contained in the French Memorial, Vol. II, Document No. 3.

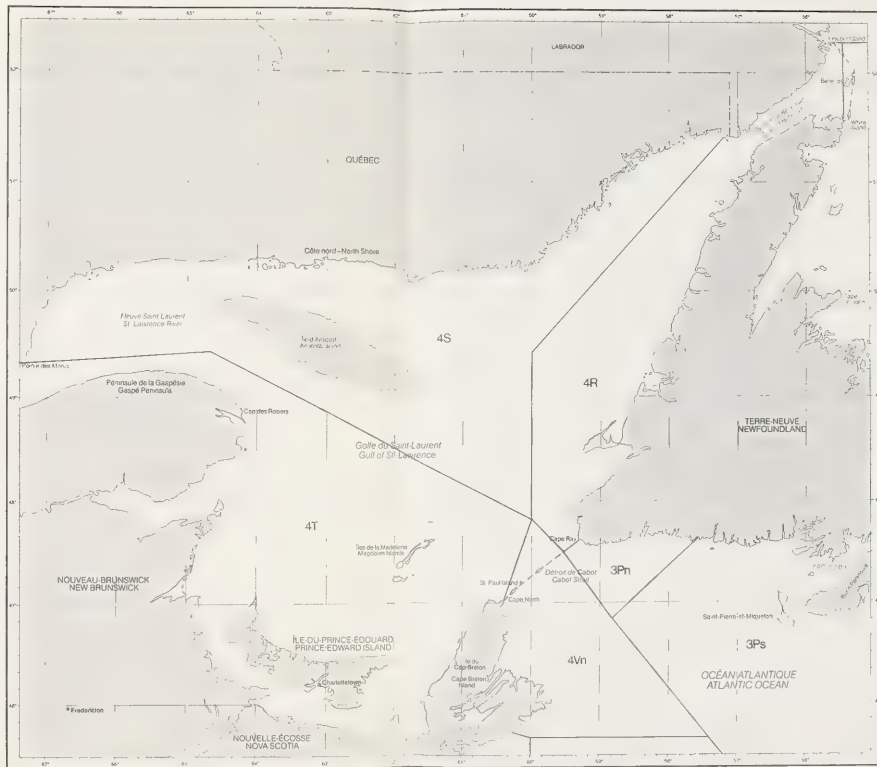




## Divisions statistiques du golfe

Divisions et subdivisions  
Divisions and Subdivisions

*(continued)*





first three of these vessels had previously fished in the Gulf under Saint-Pierre-et-Miquelon registry, and licences were routinely issued to them. The last two vessels had been previously registered in metropolitan France and were greater than 50 metres in length. LA BRETAGNE, the remaining vessel, was to be a completely new entrant in the Gulf fishery.<sup>15</sup>

21. This attempt to include what appeared to be metropolitan vessels within the category of Saint-Pierre-et-Miquelon registered trawlers entitled to fish in the Gulf under Article 4(b) raised apprehensions in Canada about France's good faith in the application of that Article. Not only were two of the vessels greater than the limit of 50 metres set out in Article 4(b), but contrary to the manifest purpose of that Article none of the three new vessels including LA BRETAGNE appeared to have a significant connection with the islands. Accordingly, action on the licences of the newly registered Saint-Pierre-et-Miquelon vessels was deferred until clarification of French intentions was received.

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<sup>15</sup> LA BRETAGNE had been granted a licence to fish in NAFO subdivision 3Ps late in 1984. It was not licensed to fish in the Gulf. See Canadian Counter-Memorial, Annex 1 for a copy of this licence. In its Memorial, France states that its claim to an area of maritime jurisdiction around Saint-Pierre-et-Miquelon is essentially equivalent to 3Ps. French Memorial, p. 66, para. 78. Canada has, of course, never recognized such a claim, which in any event has no relevance to this dispute.



22. The question of the registration of these vessels was raised initially in January 1985 when Canadian officials were in Paris for discussions concerning the delimitation of the maritime boundary around Saint-Pierre-et-Miquelon. Canada's concern was that France appeared to be attempting to bring into the Gulf under Article 4(b) vessels that did not come within the terms of that Article. France's objective, apparently, was to enhance the catch attributable to Saint-Pierre-et-Miquelon and thereby claim a future quota in the Gulf greater than the traditional catch of Saint-Pierre-et-Miquelon trawlers.<sup>16</sup> These concerns were conveyed to the French authorities informally and their attention was drawn to the fact that ISLANDE IV and ZELANDE II exceeded 50 metres in length.<sup>17</sup>

23. As a result, the registration of these two metropolitan vessels was changed back to metropolitan France and their fishing licences were duly issued. During the course of the Paris discussions, however, the Canadian representatives learned informally that LA BRETAGNE was a factory freezer trawler. This both reinforced Canada's initial concerns about the genuineness of LA BRETAGNE as a Saint-Pierre-et-Miquelon

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<sup>16</sup> The October 3, 1980 Procès-Verbal established annual quotas for the period from 1981 to 1986 inclusive. Canadian Memorial, Annex 53. Quotas have yet to be established for 1987 and beyond for Saint-Pierre-et-Miquelon trawlers fishing in the Gulf of St. Lawrence under Article 4(b) of the 1972 Agreement.

<sup>17</sup> This is referred to in the French Memorial, p. 5, para. 5.



vessel within the meaning of the 1972 Agreement, and added further problems. To authorize LA BRETAGNE to operate as a factory freezer trawler in the Gulf would differentiate between Saint-Pierre-et-Miquelon fishermen and Canadian fishermen, contrary to the equal footing principle in Article 4(b). Canadians were not entitled to operate factory freezer trawlers in similar circumstances. Moreover, a fishery conducted by a factory freezer trawler fleet would be different in nature from the limited Saint-Pierre-et-Miquelon trawler fishery in the Gulf provided for in Article 4(b), and its potential benefit to Saint-Pierre-et-Miquelon was at best obscure.

24. Concerned as it was about the attempt to bring what were essentially metropolitan vessels into the Gulf under Saint-Pierre-et-Miquelon registry, Canada made enquiries of the French authorities about the conditions for registration in a French port and particularly about the existence of any links between LA BRETAGNE and Saint-Pierre-et-Miquelon.<sup>18</sup> The reply provided by France,<sup>19</sup> while setting out the formal requirements for registration, gave no indication that LA BRETAGNE was really a Saint-Pierre-et-Miquelon vessel

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<sup>18</sup> Canadian aide-mémoire of January 17, 1985. Canadian Memorial, Annex 62.

<sup>19</sup> French diplomatic note No. 144/DJ/JFD/DA of January 19, 1985. Canadian Memorial, Annex 63.





within the meaning of the 1972 Agreement. In fact, France did not seem to see the necessity for any real links between vessels operating pursuant to Article 4(b) and Saint-Pierre-et-Miquelon.<sup>20</sup>

25. Canada was not satisfied that the question had been resolved. However, the policy on factory freezer trawlers was clear. Canada concluded that the immediate solution should be to grant a licence to LA BRETAGNE to fish in the Gulf, but with a prohibition on the filleting of its catch at sea. This would at least maintain equality of treatment between Canadian registered trawlers and Saint-Pierre-et-Miquelon registered trawlers in the Gulf. A licence was accordingly issued to LA BRETAGNE on January 24, 1985.

26. Statements made at this time reflect Canada's concern about the use of Saint-Pierre-et-Miquelon registry as a means of allowing what were essentially metropolitan vessels to continue to fish in the Gulf under Article 4(b). On January 19, officials of the Canadian Embassy in Paris advised the Director of Legal Affairs of the French Ministry of External Relations that Canada's enquiries about French vessel registration practice reflected the distinction made in the 1972 Agreement itself between Saint-Pierre-et-Miquelon and

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<sup>20</sup> Id., p. 1. Canada's reply set out in diplomatic note No. 0026 of January 24, 1985 emphasized the distinction in the 1972 Agreement between fishing vessels registered in metropolitan France and fishing vessels registered in Saint-Pierre-et-Miquelon. Canadian Memorial, Annex 64.



metropolitan registration. Canada's concern about the possibility of Saint-Pierre-et-Miquelon becoming a "flag of convenience" was expressed.<sup>21</sup>

27. To Canada, the distinction between the metropolitan fishery and the Saint-Pierre-et-Miquelon fishery in the Gulf was in danger of becoming blurred by the operation of LA BRETAGNE, which by all appearances properly belonged to the former category and not the latter. The distinction was important in 1985, but obviously it would become even more important after May 15, 1986 when the right of metropolitan vessels to fish in the Gulf would come to an end in accordance with Article 3 of the 1972 Agreement.

28. On February 27, 1985 in response to a letter from Prime Minister Fabius concerning LA BRETAGNE, Prime Minister Mulroney wrote:

Dans les circonstances, ne serait-il pas préférable de mettre de côté cette divergence d'opinion pour trouver une solution simple et pragmatique qui permettrait au chalutier "La Bretagne" de mener ses activités dans le golfe du Saint-Laurent le plus tôt possible? Aussi, pourquoi ne pas le réimmatriculer dans un port de

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<sup>21</sup> This meeting is referred to in the French Memorial, p. 7, para. 8.



France métropolitaine? Il pourrait alors utiliser son matériel de filetage dans le golfe pour la campagne de pêche en cours et même jusqu'à mai 1986.

Je suis bien sûr conscient que vous avez des préoccupations juridiques et la formule que je vous propose ne porterait pas préjudice de la position de l'une ou l'autre partie à cet égard. Cette façon de procéder aurait entre autres avantages celui de permettre à nos négociateurs de discuter de la question dans une atmosphère de bonne volonté réciproque qui permettra, j'en suis sûr, d'en arriver à une solution satisfaisante à plus long terme.<sup>22</sup>

29. Prime Minister Mulroney's proposal, which preserved the distinction between Saint-Pierre-et-Miquelon registered vessels and metropolitan registered vessels, was made without prejudice to the position of either Party. It was a proposal made in response to Prime Minister Fabius' concern, and was intended to deal with France's immediate requirements on a matter described as having "un caractère d'urgence."<sup>23</sup> France rejected

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<sup>22</sup> Canadian Memorial, Annex 8.

<sup>23</sup> Letter of February 7, 1985 from Prime Minister Fabius to Prime Minister Mulroney. Canadian Memorial, Annex 7.



Prime Minister Mulroney's proposal just as it rejected the idea of negotiations. Instead, France proposed that the matter be referred to arbitration.<sup>24</sup>

30. France does not refer in its Memorial to the fact that Prime Minister Mulroney's proposal was made pending negotiations, or to the fact that negotiations were proposed. The second paragraph quoted above and the remainder of the letter from Prime Minister Mulroney have been omitted from the annexes to the French Memorial.<sup>25</sup> Instead, France characterizes Prime Minister Mulroney's proposal as an attempt to "interdire toute modernisation de la flotte saint-pierraise."<sup>26</sup> Such an allegation, which ignores the actual terms of the proposal, is unfounded.

31. These events demonstrate the nature and consistency of Canada's concern. Article 4(b) was designed to continue a limited Saint-Pierre-et-Miquelon trawler fishery. It was not intended to accommodate a fishery

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<sup>24</sup> Letter of March 21, 1985 from Prime Minister Fabius to Prime Minister Mulroney, with aide-mémoire of the same date attached. Canadian Counter-Memorial, Annex 2.

<sup>25</sup> French Memorial, Vol. II, Document No. 18. The full text of the letter and of the aide-mémoire to which it refers are found in the Canadian Memorial, Annex 8.

<sup>26</sup> French Memorial, p. 89, para. 103.





that had changed its nature, nor was it to be used as a vehicle for reintroducing into the Gulf a metropolitan French fishery that was to be excluded under Article 3. Canada's apprehensions in this regard were not allayed by France in January 1985, and they have not been allayed to this day.



### PART III

#### THE PURPOSE AND EFFECT OF THE 1972 AGREEMENT

32. This Part will rebut the French argument that the 1972 Agreement should be interpreted in the light of France's historic fishery in the Gulf. The primary purpose of the 1972 Agreement was to change the fishery to respond to new needs, not to continue the practices of the past. The continuation of a limited fishery for Saint-Pierre-et-Miquelon was a particular exception to the general phasing-out of French fishing from the Gulf.

##### **A. The Irrelevance of France's Historic Fishery in the Gulf**

33. France suggests in its Memorial that throughout history, right up to the negotiation of the 1972 Agreement, it had a substantial fishery in the Gulf of St. Lawrence which was the precursor to the Saint-Pierre-et-Miquelon trawler fishery under Article 4(b). The picture given by France of the French fishery in the Northwest Atlantic fails to distinguish between the fishery conducted from metropolitan France and the Saint-Pierre-et-Miquelon trawler fishery that was continued under Article 4(b). The French account of its historic fishery is irrelevant in fact, since the Saint-Pierre-et-Miquelon fishery did not develop in the Gulf until the 1960s, and it is irrelevant in law, since France's prior rights were abrogated by the 1972 Agreement.



1. France's Northwest Atlantic fishery was not centred in the Gulf of St. Lawrence

34. France's account of the history of its fishery suggests a constant presence throughout the Northwest Atlantic since the sixteenth century.<sup>27</sup> France also implies that historically its fishery was concentrated in the Gulf of St. Lawrence. However, the French Northwest Atlantic fishery was cyclical rather than constant, shifting from one locale to another and sometimes disappearing completely.<sup>28</sup> The French fishery was concentrated outside the Gulf off northeastern Newfoundland, and on the Grand Banks off Newfoundland's southeast coast.<sup>29</sup>

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27 Id., pp. 34-40, paras. 38-45; p. 44, para. 50.

28 The longest lapse was for a period of over twenty years at the end of the eighteenth and beginning of the nineteenth centuries. Certain fishing areas, such as the coastal waters of Labrador and Cape Breton, were abandoned and reoccupied at different periods. C. de la Morandière: Histoire de la pêche française de la morue dans l'Amérique septentrionale, Vol. I, Paris, G.P. Maisonneuve et Larose, 1962, pp. 213 and 273; Vol. II, Paris, G.P. Maisonneuve et Larose, 1962, pp. 640 and 706-707. Canadian Counter-Memorial, Annex 3.

29 For example, in the mid-eighteenth century when the French fishery peaked in the Northwest Atlantic there were approximately four hundred French vessels operating in the area. Half of them prosecuted the Banks fishery (known as the "pêche errante" or wet fishery). The others practised the dry fishery (where the catch is dried on land) along the coasts. Records for this period indicate that the dry fishery was practised primarily on the  
(Cont'd on next page)



35. The French Gulf fishery, which was much less significant, was essentially a coastal fishery located on different shores within the Gulf at different times and by the nineteenth century exclusively on the western shore of Newfoundland.<sup>30</sup> France has never had a monopoly in the Gulf. The early Gulf fishery was shared with British, Portuguese and Spanish fleets, and by the mid-nineteenth century a substantial Gulf fishery had been developed by the New Englanders and Newfoundlanders.<sup>31</sup> By the end of the nineteenth century the French fishery in the Gulf was of minor importance and it did not regain the position it had in

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northeast coast of Newfoundland (known as the "Petit Nord") and on the southern coast. The coastal fishery on the Gulf shores was not significant. Id., Vol. II, pp. 636, 639, 681-682, 683, 702, 728 and 846. Canadian Counter-Memorial, Annex 3.

30 The coasts of Labrador, Cape Breton and Gaspé were the principal fishing areas in the Gulf. These were abandoned following the Seven Years War (1756-1763). The western shore of Newfoundland was not frequented before the nineteenth century. Id., Vol. II, pp. 702, 965-966 and 977; Vol. III, Paris, G.P. Maisonneuve et Larose, 1966, p. 1165. Canadian Counter-Memorial, Annex 3.

31 Id., Vol. I, pp. 219-221; Vol. III, p. 1178. Canadian Counter-Memorial, Annex 3. H.A. Innis: The Cod Fisheries, The History of an International Economy, Toronto, University of Toronto Press, 1954, pp. 324-326. Canadian Counter-Memorial, Annex 4.





earlier centuries.<sup>32</sup> The French fishery in the Gulf never had the character now attributed to it by France.

2. Saint-Pierre-et-Miquelon played a service role for the metropolitan fishery; it did not develop its trawler fishery in the Gulf until the 1960s

36. As the French Memorial points out,<sup>33</sup> the islands of Saint-Pierre-et-Miquelon were ceded to provide shelter for French fishermen.<sup>34</sup> This description aptly

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<sup>32</sup> Records indicate that there were approximately eight French vessels operating in the Gulf in 1890. C. de la Morandière: Histoire de la pêche française de la morue dans l'Amérique septentrionale, supra, note 30, Vol. III, pp. 1225 and 1235. See also Vol. III, pp. 1165 and 1167. Canadian Counter-Memorial, Annex 3.

<sup>33</sup> French Memorial, p. 37, paras. 41 and 42; p. 80, para. 100.

<sup>34</sup> "The King of Great Britain cedes the Islands of St. Pierre and Miquelon, in full right, to His Most Christian Majesty, to serve as a shelter to the French Fishermen: and His said Most Christian Majesty engages not to fortify the said Islands; to erect no buildings upon them, but merely for the convenience of the Fishery; and to keep upon them a Guard of 50 Men only for the Police." (Official English translation.) Treaty of Peace between Great Britain and France, signed at Paris, February 10, 1763, Art. VI. British and Foreign State Papers, 1812-1814, Vol. I, Part I, London, James Ridgway and Sons, 1841, p. 423. The cession of the islands was subsequently confirmed in the Treaty of Peace between Great Britain and France, signed at Versailles, September 3, 1783, art. IV. The declarations attached to this  
(Cont'd on next page)



fits the role the islands traditionally played.<sup>35</sup> Although an inshore fishery was developed by the permanent inhabitants of the islands,<sup>36</sup> the fishery within the Gulf was essentially a metropolitan fishery, not a Saint-Pierre-et-Miquelon fishery.<sup>37</sup> The inshore fishery itself underwent periods of decline.<sup>38</sup> The importance of the islands to the French metropolitan fishery waxed and waned and the French government offered bounties to encourage vessels to come to the Northwest Atlantic.<sup>39</sup>

37. The development of a trawler fleet operating out of Saint-Pierre, in 1952, is the beginning of the fishery that is now provided for in Article 4(b) of the

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treaty reaffirm the purpose of the cession of the islands. British and Foreign State Papers, 1812-1814, Vol. I, Part I, pp. 424-427. Canadian Counter-Memorial, Annexes 5 and 6.

35 C. de la Morandière: Histoire de la pêche française de la morue dans l'Amérique septentrionale, supra, note 30, Vol. III, p. 1245. Canadian Counter-Memorial, Annex 3.

36 Ibid. Canadian Counter-Memorial, Annex 3.

37 Although some vessels that operated out of Saint-Pierre-et-Miquelon went into the Gulf, they were owned and crewed by companies from metropolitan France. Id., Vol. III, p. 1349. Canadian Counter-Memorial, Annex 3.

38 Id., Vol. II, p. 837; Vol. III, pp. 1346, 1364 and 1365. Canadian Counter-Memorial, Annex 3.

39 Id., Vol. II, pp. 782, 800 and 837; Vol. III, p. 1346. For an explanation of the French bounty system, see Vol. II, p. 971. Canadian Counter-Memorial, Annex 3.



1972 Agreement. That fishery was apparently not conducted inside the Gulf until the 1960s<sup>40</sup> and even then it was located predominantly outside the Gulf, as France acknowledged in 1964. A map provided at that time by the French authorities<sup>41</sup> indicates that these trawlers went only a limited distance into the Gulf and stayed relatively close to the shore (see Figure 2). In 1971 the potential exclusion of these vessels from Trepassey and Placentia Bays off the south coast of Newfoundland, as a result of the trawler exclusion rule,<sup>42</sup> was a particular concern of French negotiators. There was never any suggestion in those negotiations that what was being preserved was an historic fishery by Saint-Pierre-et-Miquelon trawlers within the Gulf.<sup>43</sup>

3. In any event, France's prior fishing rights were renounced in the 1972 Agreement which is the sole source of French rights in the Gulf

38. The essence of France's position is that the 1972 Agreement should be interpreted as if France's his-

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<sup>40</sup> Canadian Memorial, paras. 29-30.

<sup>41</sup> This map was provided to Canada pursuant to an undertaking by French negotiators in April 1964 to furnish information about French fishing grounds. "Preliminary Talks with France, April 7-8, 1964," p.14, para. 26. Canadian Memorial, Annex 41. It was forwarded under cover of a note verbale of June 30, 1964. Canadian Counter-Memorial, Annex 7.

<sup>42</sup> Canadian Memorial, para. 48, note 79.

<sup>43</sup> Id., paras. 42, 44, 49 and 52.



Figure 2

La pêche de  
Saint-Pierre-et-Miquelon  
en 1964 d'après une  
carte fournie par la  
France

The Saint-Pierre-et-  
Miquelon Fishery in  
1964 Based on Chart  
Provided by France

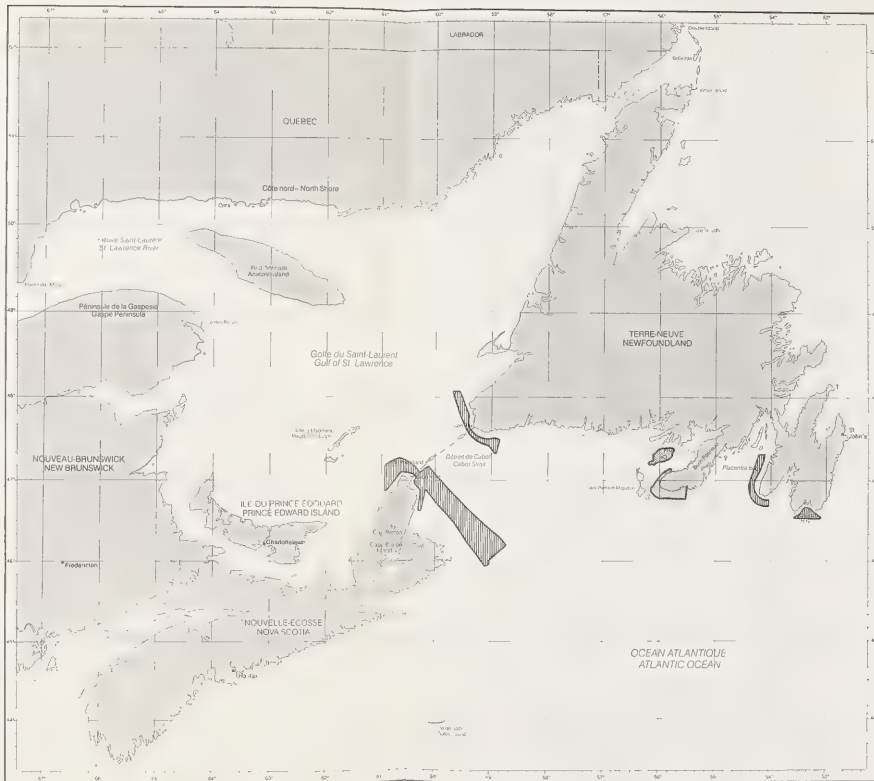


Chalutiers  
Trawlers

Embarcations de pêche côtière  
Coastal Fishing Boats

NOTE: La carte française sera  
déposée auprès du Tribunal lors  
de la procédure orale. Elle est à la  
disposition du Tribunal et de  
l'Agent de la France pour examen  
à tout moment.

NOTE: The French chart will be  
deposited with the Tribunal at the  
oral proceedings and is available  
for inspection by the Tribunal and  
the Agent for France at any time.







toric rights in the Gulf were simply "renouvelés et redéfinis"<sup>44</sup> in the Agreement. Canada, by contrast, was granted a limited right in the 1972 Agreement to regulate the French fishery in the Gulf for conservation purposes. In sum, France's rights in the Gulf vested long ago -- the 1972 Agreement simply records them; Canada's rights in the Gulf are contractual -- they flow from the 1972 Agreement. By such reasoning France turns reality on its head, as if France were the coastal State in the Gulf of St. Lawrence and Canada the outsider.

39. The 1972 Agreement is the sole source of French rights in the Gulf of St. Lawrence. Article 1 of the 1972 Agreement is clear and unequivocal:

The Government of France renounces the privileges established to its advantage in fishery matters by the Convention signed at London, on April 8, 1904, between the United Kingdom and France. The present agreement supersedes all previous treaty provisions relating to fishing by French nationals off the Atlantic coast of Canada.

France states in its Memorial<sup>45</sup> that the 1972 Agreement "adapts" France's previous rights, but this flies in the face of the plain meaning of Article 1 which uses the terms "renounces" and "supersedes." The 1972 Agreement adapted "the mutual relations in fishery matters" of

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<sup>44</sup> French Memorial, p. 34, para. 38. Unofficial translation: "renewed and redefined".

<sup>45</sup> Id., p. 52, para. 58.



Canada and France;<sup>46</sup> it did not "adapt" prior rights and obligations. Any right in the Gulf claimed by France today must be shown to have been granted by Canada in the 1972 Agreement.

4. France's renunciation of rights was in exchange for assurances regarding French fishing in any future Canadian fishing zone and not in exchange for rights for Saint-Pierre-et-Miquelon trawlers in the Gulf under Article 4(b)

40. The counterpart to the renunciation of rights in Article 1 is found in the opening words of Article 2: "in return," Canada undertook to recognize the right of French nationals to fish in any future zone of Canadian fisheries jurisdiction beyond the then limits of the territorial sea and fishing zones of Canada on the Atlantic coast. Thus, France was to give up any prior rights in the Gulf of St. Lawrence and in exchange was to be provided future fishing rights outside the Gulf. A generous 15-year phasing-out arrangement was provided under Article 3 for French metropolitan vessels in order to allow them to relocate to new grounds.<sup>47</sup> In this respect, the 1972 Agreement followed a common pattern of

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<sup>46</sup> Preamble to the 1972 Agreement.

<sup>47</sup> The maximum phasing out period granted to any other State for the Gulf of St. Lawrence was 4 years. Exchange of Notes between the Government of Canada and the Government of Denmark Concerning Fisheries Relations between the Two Countries, signed at Ottawa, March 27, 1972, para. 3. Canadian Counter-Memorial, Annex 8.



agreements entered into by coastal States and distant water fishing States around the world by which past fishing practices were terminated subject to a phasing-out arrangement.<sup>48</sup>

41. Article 4 was completely different. There is no suggestion that it was "in return" for anything. Article 4 was a voisinage arrangement based on the "special situation" of Saint-Pierre-et-Miquelon and made in light of the general exclusion of French fishing from the Gulf and the application of the trawler exclusion rule. It bore no relationship to the fishing practices of a metropolitan French fishery in prior centuries.

#### **B. The Object and Purpose of the 1972 Agreement**

1. The primary purpose of the 1972 Agreement was to phase French vessels out of the Gulf with a special exception in the case of Saint-Pierre-et-Miquelon trawlers

42. France treats the provisions of the 1972 Agreement relating to the Saint-Pierre-et-Miquelon trawler fishery as if they were no different from the provisions relating to the metropolitan fishery.<sup>49</sup> In France's view the 1972 Agreement simply continued the

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<sup>48</sup> The emergence of this pattern is traced in D.P. O'Connell: The International Law of the Sea, Vol. I, Oxford, Clarendon Press, 1982, pp. 532-539. Canadian Counter-Memorial, Annex 9.

<sup>49</sup> French Memorial, Deuxième partie, section II, pp.52-57, paras. 58-65.



past in a slightly different form.<sup>50</sup> In Canada's view, there is no justification whatsoever for such an approach. The very purpose of the 1972 Agreement was to bring about an unambiguous and decisive change with the past: prior fishing rights were terminated and a phase-out of French fishing from the Gulf was provided for. This element is the key to understanding the 1972 Agreement. It makes the exceptional nature of Article 4(b) clear, in contrast with the phase-out of metropolitan vessels from the Gulf.

2. The special exception for Saint-Pierre-et-Miquelon was granted on the basis of "voisinage", not on the basis of an historic fishery

43. The rationale for the exceptional right in Article 4(b) is expressed simply in the chapeau to Article 4, "in view of the special situation of Saint-Pierre and Miquelon and as an arrangement between neighbours." The concept of a voisinage arrangement is

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<sup>50</sup> France emphasizes this idea of continuity by arguing that the rights granted under the 1972 Agreement are in perpetuity. French Memorial, p. 51, para. 57; pp. 80-81, para. 100. While no termination date is provided in the Agreement, equally there is no provision that the Agreement is to continue in perpetuity. In this regard, State practice shows that agreements relating to fishing rights are invariably transitory and not permanent. In any event, the matter has no relevance to this arbitration.





well-known in French practice.<sup>51</sup> Such arrangements derive from the fact of voisinage, and they seek to regulate relations in the light of that fact.<sup>52</sup>

44. The 1972 Agreement is not a voisinage agreement as such -- Canada and metropolitan France are not neighbours. Article 4 of that Agreement, however, is expressly characterized as a voisinage provision and thus its object differs from the object and purpose of the Agreement as a whole. Furthermore, Article 4(b) provides an exception to the principal purpose of the Agreement, designed to grant a limited right to Saint-Pierre-et-Miquelon trawlers. France has therefore misconstrued both the object and purpose of the 1972 Agreement and the object of Article 4.

45. France's argument that the condition attached to LA BRETAGNE's licence is contrary to the object and purpose of the 1972 Agreement is also predicated on the view that this condition will prevent all modernization of the Saint-Pierre-et-Miquelon fleet and deprive LA BRETAGNE, and the Saint-Pierre-et-Miquelon fleet gene-

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51 There is a history of "accords de voisinage" in French fisheries practice. A. Boyer: "La réglementation internationale des pêches maritimes," Notes et études documentaires, No. 3618, Paris, La documentation française, September 11, 1969, pp. 14-17. Canadian Counter-Memorial, Annex 10.

52 J. Andrassy: "Les relations internationales de voisinage," Académie de Droit international, Recueil des Cours, Vol. 79, 1951, p. 73 at p. 81. Canadian Counter-Memorial, Annex 11.



rally, of their right to fish under Article 4(b). Part V of this Counter-Memorial will show that there is no foundation to such an argument. Modernization does not require filleting at sea and the prohibition of factory freezer trawlers in the Gulf does not take away the right to fish under Article 4(b).

### **C. The Interpretation of Article 4(b)**

46. The Canadian Memorial noted that the objective in interpreting a treaty is to find the common intention of the parties, which is to be ascertained from the words used in their context and in the light of the treaty as a whole, including the circumstances of its negotiation.<sup>53</sup> The considerable section devoted to this question in the French Memorial appears to reach the same conclusion.<sup>54</sup> Yet France's interpretation of Article 4(b) of the 1972 Agreement differs from that of Canada in important respects.

1. The Parties clearly intended in 1972 that the Saint-Pierre-et-Miquelon trawler fishery in the Gulf would be a limited fishery

47. France contends in its Memorial that Article 4(b) grants a more substantial right than that accorded

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<sup>53</sup> Canadian Memorial, para. 64.

<sup>54</sup> French Memorial, Première partie, section IV, pp. 17-32, paras. 20-36.



to metropolitan vessels under Article 3 because Saint-Pierre-et-Miquelon trawlers are not made subject to effort and species limitations by Article 5.<sup>55</sup>

48. France's interpretation of Article 4(b) as allowing for an expansion of fishing activity is significantly different from the position taken by its negotiators in 1971. As the Canadian Memorial points out,<sup>56</sup> the exclusion of the Article 4(b) fishery from the ambit of the species and effort limitations of Article 5 was neither an oversight nor the result of a decision to allow an unlimited fishery to Saint-Pierre-et-Miquelon trawlers. Article 5 was not made applicable to Saint-Pierre-et-Miquelon trawlers under Article 4(b) because of assurances by the French negotiator that this provision would not be necessary in view, inter alia, of the limited catch taken by the Saint-Pierre-et-Miquelon vessels.<sup>57</sup> There was never any intention to provide carte blanche to Saint-Pierre-et-Miquelon trawlers.

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<sup>55</sup> Id., pp. 54-55, para. 62.

<sup>56</sup> Canadian Memorial, para. 51.

<sup>57</sup> "Fisheries Phasing-Out Negotiations: France, First Round of Talks, May 19-21, 1971," pp. 13-14. Canadian Memorial, para. 51 and Annex 43.



2. Canada's authority to establish further limitations on the Saint-Pierre-et-Miquelon trawler fishery in the Gulf on an equal footing was not constrained by the 1972 Agreement

49. The fact that specific catch or species limitations were not imposed on Saint-Pierre-et-Miquelon trawlers under Article 4(b) did not foreclose Canada's rights for the future. Obviously, if quotas or catch limitations were to become necessary in the Gulf, as they did shortly after 1972, Canada could establish such limitations and apply them on an equal footing to Saint-Pierre-et-Miquelon trawlers. The only constraint on Canada is the obligation not to discriminate. Nothing in Article 4(b) or elsewhere in the 1972 Agreement provided that Saint-Pierre-et-Miquelon trawlers were to be placed in a preferential position vis-à-vis Canadian trawlers.

50. France's claim and its implicit argument that Article 4(b) provides for considerable expansion in the fishing effort of Saint-Pierre-et-Miquelon call into question the common assumptions of the Parties at the time the 1972 Agreement was negotiated. These common assumptions, which as the Canadian Memorial pointed





out,<sup>58</sup> were based on assurances given by France in both 1964 and 1971, were the essential basis on which the assent of Canada to the 1972 Agreement was expressed. If the nature of the fishery that was provided for under Article 4(b) was to be radically transformed, contrary to those common assumptions, there would be a fundamental change in the obligation assumed by Canada.

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<sup>58</sup> Canadian Memorial, paras. 52, 69 and 72.



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PART IV

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THE REGULATION OF THE FISHERY IN THE  
GULF OF ST. LAWRENCE

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51. This Part will deal with France's argument that Canada's fisheries jurisdiction in the Gulf of St. Lawrence is limited and that the prohibition attached to LA BRETAGNE's licence constitutes discrimination. According to France, Canada can regulate the fishery in the Gulf only to the extent that the measures are necessary for the conservation of fishery resources.<sup>59</sup> In France's view, this means that Canada can regulate the taking of fish from the water;<sup>60</sup> but not the treatment of the catch once it is on board. France, in effect, denies Canada's exclusive rights over the fishery in the Gulf of St. Lawrence and narrowly constrains the rights that it does concede to Canada.<sup>61</sup> Canada will show that this view has no support under in-

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59 French Memorial, pp. 56-57, paras. 64-65.

60 Id., p. 57, para. 64.

61 Although France recognizes that Canada may regulate "la récolte ou la capture des êtres vivants qui peuplent les eaux," (French Memorial, p. 57, para. 64), it also states that France agreed that its catches in the Gulf would be "limitées d'un commun accord," (id., p. 81, para. 100). Emphasis added. Canada does not accept that quotas in the Gulf are set in this way. The right to determine quotas in the Gulf, and elsewhere in waters subject to Canadian jurisdiction, is the exclusive right of Canada. Unofficial translation: "harvesting or catching living creatures that inhabit water" ... "limited by mutual agreement."



ternational law generally, in State practice, or under the 1972 Agreement. Canada's authority to regulate the French fishery in the Gulf of St. Lawrence is limited in the 1972 Agreement only by the obligation not to discriminate. No discrimination exists in this case.

**A. The Exclusive Fisheries Jurisdiction of Canada in the Gulf of St. Lawrence**

52. Canada's exclusive jurisdiction over fisheries in the Gulf of St. Lawrence was recognized by France in 1972. Contrary to the position asserted by France, the scope of that jurisdiction is far broader than "la pêche" -- which in the French view means only the catching of fish.<sup>62</sup> In conformity with international law as reflected in State practice, and with the 1972 Agreement, Canada may regulate the French fishery in the Gulf in order to further Canadian economic and social as well as conservation objectives. Thus, regardless of France's argument that "filleting is not fishing,"<sup>63</sup> Canada can regulate processing activities on board foreign vessels in the Gulf of St. Lawrence.

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<sup>62</sup> French Memorial, p. 81, para. 100.

<sup>63</sup> French aide-mémoire of March 21, 1985 attached to a letter of the same date from Prime Minister Fabius to Prime Minister Mulroney. Canadian Counter-Memorial, Annex 2. Ironically, if filleting is not fishing, then France has no right at all to fillet in the Gulf of St. Lawrence because Article 4(b) grants only a right "to fish."



1. The scope and nature of Canada's exclusive fisheries jurisdiction as defined under Canadian law were recognized by France in the 1972 Agreement

53. The 1972 Agreement, like the phasing-out agreements with other States, acknowledged exclusive Canadian jurisdiction over the fishery of the Gulf of St. Lawrence. France recognized in that Agreement that its vessels were subject to Canadian fisheries jurisdiction, and thereby to a regulatory system which in accordance with Canadian law is the same whether applied to internal waters, territorial sea or fishing zone.<sup>64</sup> In this regard, Canada's authority exists completely independently of any agreement with France. It is inherent in Canada as the coastal State and is acknowledged by other States whose fishing operations have been phased out of the Gulf.

54. This phasing out of foreign fishing from the Gulf of St. Lawrence constitutes clear recognition by France and by the other States previously fishing there that the Gulf falls within the exclusive fisheries jurisdiction of Canada. Notwithstanding the substantial fishery by foreign States within the Canadian 200-mile

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<sup>64</sup> For the purpose of Canadian fisheries regulation, "Canadian fisheries waters" are defined as: "all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada." Coastal Fisheries Protection Act, R.S.C. 1970, c. C-21, s.2; Fisheries Act, R.S.C. 1970, c. F-14, s. 2. Canadian Memorial, Annexes 2 and 14. These definitions existed in 1972.





zone, currently conducted under bilateral fisheries agreements in conformity with the terms of the 1982 Convention on the Law of the Sea, no State, apart from France and Denmark,<sup>65</sup> has been granted a right to fish in the Gulf of St. Lawrence or claims that it should be able to fish there.

55. Contrary to the suggestion made in France's Memorial,<sup>66</sup> Canada has never in any way renounced its claim that the waters of the Gulf of St. Lawrence are part of the internal waters of Canada. Canada's action of drawing fisheries closing lines to encompass the waters of the Gulf of St. Lawrence in 1971 was an exercise of sovereignty, not a renunciation of a claim. This was made clear at the time in a statement tabled in the House of Commons by Canada's Minister of Fisheries and Forestry, which is included by France in the annexes to its Memorial.<sup>67</sup> Canada's action was part of a "functional" approach to the exercise of its jurisdiction, under which Canada exercised only such elements of

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<sup>65</sup> Faroese vessels are permitted to fish in the Gulf for porbeagle shark which is not currently fished by Canadian fishermen. This is a minimal fishery which does not involve factory freezer trawlers. Agreement between Canada and the Kingdom of Denmark Concerning Faroese Fishing off the Canadian Coast, signed at Ottawa, June 3, 1980, Canadian Treaty Series (C.T.S.), 1981, No. 29, art. II (4). Canadian Counter-Memorial, Annex 12.

<sup>66</sup> French Memorial, p. 48, para. 54.

<sup>67</sup> Id., Vol. II, Document No. 20, pp. 3-4. House of Commons Debates, Official Report, December 18, 1970, Vol. II, 1970, pp. 2189-2190 and 2244-2245 at p. 2244. Canadian Counter-Memorial, Annex 13.



its sovereign authority as it deemed desirable, without prejudicing its claim to full sovereignty.<sup>68</sup> The waters of the Gulf of St. Lawrence are, and remain, the internal waters of Canada.

56. In any event, the legal status of the waters of the Gulf of St. Lawrence is not a matter that falls within the jurisdiction of the Tribunal in this arbitration. The present case concerns only the rights accorded to France under the 1972 Agreement. It is undisputed that Canada exercises exclusive fisheries jurisdiction over the waters off its coasts both inside and outside of the Gulf. Canada's rights within the Gulf obviously cannot be less than they are elsewhere within 200 miles of its coast.<sup>69</sup>

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68 L.H. Legault: "Maritime Claims," in R. St. J. MacDonald, G. Morris and D.M. Johnston (eds.): Canadian Perspectives on International Law and Organization, Toronto, University of Toronto Press, 1974, p. 377 at p. 385. Canadian Counter-Memorial, Annex 14.

69 The exclusive jurisdiction of the coastal State over fisheries in all waters up to 200 miles from its coast was confirmed in the 1982 United Nations Convention on the Law of the Sea, A/Conf.62/122, October 7, 1982. Canada and France both signed this Convention on December 10, 1982. Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1984, New York: United Nations, 1985, p. 671. Canadian Counter-Memorial, Annexes 15 and 16.



2. Canada's authority to regulate fisheries in waters subject to its jurisdiction in order to achieve economic and social, as well as conservation, objectives is recognized under international law

57. Canada's authority, recognized under international law, to regulate fisheries within waters subject to its jurisdiction is exclusive and plenary. As the following sections will show, under international law a coastal State has general powers of legislation, regulation and licensing control by which it may promote not only conservation needs but also its general economic and social policies in relation to those fisheries. This is recognized in the 1982 Convention on the Law of the Sea, and is demonstrated in general State practice and in Canadian bilateral treaty practice.

(i) The 1982 Convention on the Law  
of the Sea

58. The 1982 Convention on the Law of the Sea does not limit the authority of a coastal State within its 200-mile zone to "conservation" measures. States have a broad authority in respect of both conservation and management, in the regulation of types of vessels, and in the imposition of other appropriate terms and conditions. Article 56 of the 1982 Convention provides that the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed... ." Article 62 paragraph 4 provides that "[n]ationals of other States fishing in the exclusive economic zone shall comply with



the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."<sup>70</sup> Included among the laws and regulations that may be applied in accordance with paragraph 4 are those "regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used."<sup>71</sup>

59. No doubt the conditions established by the coastal State should not go so far as to prevent, in practice, the other State from fishing.<sup>72</sup> But such a limitation derives from the principle of reasonableness, not from the Convention. As Professor O'Connell notes: "there is nothing in the Draft Convention to restrain the coastal State in respect of the conditions which it seeks to impose."<sup>73</sup>

(ii) General State Practice

60. The practice of coastal States demonstrates that they are fully competent to regulate foreign

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<sup>70</sup> Emphasis added.

<sup>71</sup> Sub-paragraph (c). Emphasis added.

<sup>72</sup> C.A. Fleischer: "The Exclusive Economic Zone Under the Convention Regime and in State Practice," in A.W. Koers and B.H. Oxman (eds.): The 1982 Convention on the Law of the Sea, Honolulu, The Law of the Sea Institute, University of Hawaii, 1983, p. 241 at p. 275. Canadian Counter-Memorial, Annex 17.

<sup>73</sup> Op. cit. supra, note 48, p. 567. Canadian Counter-Memorial, Annex 10.





fisheries within their waters. This can be illustrated by the legislation or regulations of States in several areas. First, States wishing to protect the interests of local fishermen prohibit the landing of foreign catches in their territory.<sup>74</sup> Second, States wishing to further the interests of their shore-based processing industries require foreign vessels to land their catch in the coastal State.<sup>75</sup> Third, States wishing to improve the skills of their own fishermen or to enhance their employment opportunities require foreign fishing vessels to employ nationals of the coastal State.<sup>76</sup> Fourth, coastal States maintain a specific interest in the type of activities taking place on vessels by requiring information on the nature of the equipment on board, and by regulating the types of equipment that may be used.<sup>77</sup> Regulations such as these are concerned primarily with the economic and social

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74 See the legislation of: Chile, Malta, Mexico, Norway and Sudan. Canadian Counter-Memorial, Annex 18.

75 See the legislation of Barbados, Colombia, Costa Rica, Fiji, Haiti, Liberia, Malaysia and Senegal. Canadian Counter-Memorial, Annex 19.

76 See the legislation of: Bangladesh, Costa Rica, Mexico, Philippines and Sri Lanka. Canadian Counter-Memorial, Annex 20.

77 See the legislation of: Australia, Bahamas, Comoro Islands, Cook Islands, France, India, Nauru, New Zealand, and Western Samoa. Canadian Counter-Memorial, Annex 21.



objectives of States in respect of their fisheries, and have no relation to conservation. They demonstrate the plenary nature of the coastal States' authority in regulating foreign fishing in its waters.

61. This practice demonstrates more specifically that coastal States regulate processing on board foreign vessels in waters subject to their jurisdiction.<sup>78</sup> In some cases differential licence fees are imposed on factory freezer trawlers<sup>79</sup> to discourage filleting at sea; in other cases the areas in which freezer and factory freezer vessels can operate are designated.<sup>80</sup> France itself asserts a right to establish conditions relating to "opérations accessoires de la pêche à bord des navires,"<sup>81</sup> and regulates expressly certain processing operations on board vessels.<sup>82</sup>

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78 See the legislation of: Australia, Comoro Islands, Cook Islands, the European Economic Community, France, Nauru, New Zealand, United States of America and Western Samoa. Canadian Counter-Memorial, Annex 21.

79 See the legislation of: Mauritania and Uruguay. Canadian Counter-Memorial, Annex 22.

80 See the legislation of: Bahamas, Norway and Senegal. Canadian Counter-Memorial, Annex 23.

81 Loi n° 85-542, du 22 mai 1985 modifiant le décret du 9 janvier 1852 sur l'exercice de la pêche maritime, art. 1 modifying art. 3(8°). Canadian Counter-Memorial, Annex 24.

82 "Mesures pour assurer la conservation des ressources de la pêche dans les eaux territoriales et la zone économique française en mer du Nord, Manche et Atlantique Nord," Arrêté du 19 avril 1978,



62. This exercise of authority by coastal States over the activities of foreign vessels fishing in their waters is not challenged. States wishing to fish in foreign waters accept in the agreements they conclude that they are subject to the authority of the coastal State in the conduct of their fishing operations, and that the regulations enacted by coastal States will not relate solely to conservation. This is evidenced in the agreements they conclude.<sup>83</sup>

(iii) Canadian Practice

63. States fishing within Canada's 200-mile zone are subject to all Canadian fishery regulations. None of the bilateral fisheries agreements entered into by Canada limit Canada's regulatory authority in its 200-mile zone to matters of conservation. France refers to the phrase "l'amélioration de l'utilisation et du traitement des prises" in the agreement of May 19, 1976

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art. 10(1). "Mesures techniques de conservation des ressources de la pêche dans certaines eaux maritimes françaises," Arrêté du 15 mars 1982, art. 13. Canadian Counter-Memorial, Annex 24.

<sup>83</sup> See the following agreements: Angola-Nigeria, Angola-Spain, Australia-Republic of Korea, Equatorial Guinea-Nigeria, Guinée Bissau-European Economic Community, Guyana-Barbados, Guyana-Suriname, Japan-United States of America, Madagascar-European Economic Community, Mauritania-Republic of Korea, Mauritania-Senegal, Mauritania-Spain, Morocco-Spain, Senegal-European Economic Community, Senegal-Ivory Coast, Senegal-Poland, Senegal-Spain. Canadian Counter-Memorial, Annex 25.



between Canada and the Union of Soviet Socialist Republics<sup>84</sup> as if such a provision were unique and as if the provision itself granted Canada its authority.<sup>85</sup> In fact, such a phrase, which refers only to bilateral co-operation and has nothing to do with the application of fishery regulations, is found in practically all of the bilateral fisheries agreements concluded by Canada with respect to its 200-mile fishing zone.<sup>86</sup>

64. Rather than supporting the French argument that Canada is limited in its authority to regulate the fishery to matters of conservation, the agreement between Canada and the Union of Soviet Socialist Republics shows the opposite. Article II paragraph 3, which is not referred to by France, provides:

They [Soviet vessels] shall comply with the conservation measures and other terms and conditions es-

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<sup>84</sup> C.T.S., 1976, No. 6. Canadian Counter-Memorial, Annex 26.

<sup>85</sup> French Memorial, p. 59, para. 67.

<sup>86</sup> The improvement of utilization and processing of catches is referred to in fishing agreements concluded by Canada with the following States: Poland (C.T.S., 1976, No. 5), U.S.S.R. (C.T.S., 1976, No. 6), Spain (C.T.S., 1976, No. 7), Portugal (C.T.S., 1977, No. 21), Cuba (C.T.S., 1977, No. 17), Bulgaria (C.T.S., 1977, No. 28), G.D.R. (C.T.S., 1977, No. 30), Romania (C.T.S., 1978, No. 2), Japan (C.T.S., 1978, No. 8), European Economic Community (C.T.S., 1979, No. 33), Denmark (C.T.S., 1981, No. 29), European Economic Community (C.T.S., 1981, No. 30), Poland (C.T.S., 1982, No. 8). The only similar agreement in which no such reference is made is that with Norway, (C.T.S., 1976, No. 4). Canadian Counter-Memorial, Annex 26.





tablished by the Government of Canada and shall be subject to the laws and regulations of Canada in respect of fisheries. (Emphasis added.)

65. The breadth of the scope of such a provision has been emphasized by one commentator, when referring to an almost identical provision in an agreement between Canada and Norway,<sup>87</sup> as follows:

Ce paragraphe constitue de la part de la Norvège une reconnaissance inconditionnelle de la juridiction du Canada non seulement de réglementer l'accès des navires étrangers à cette zone mais de réglementer chaque aspect des opérations de pêche des navires norvégiens dans cette zone. Prima facie, il n'existe aucune limitation au pouvoir réglementaire du Canada si ce n'est l'obligation générale de conservation et de l'utilisation optimale des ressources biologiques prévue au texte de négociation révisé.<sup>88</sup>

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<sup>87</sup> C.T.S., 1976, No. 4.

<sup>88</sup> A.L.C. de Mestral: "Accord entre le Canada et la Norvège sur leurs relations en matière de pêche," Canadian Yearbook of International Law, Vol. 14, 1976, p. 270 at p. 278. Unofficial translation: "This paragraph constitutes Norway's unconditional recognition of Canada's jurisdiction, not only to regulate the access of foreign vessels to this zone, but also to regulate every aspect of the fishing activities of Norwegian vessels in this zone. Prima facie, there exists no limitation on Canada's regulatory power other than the general obligation of conservation and optimum utilization of the living resources expressed in the revised negotiating text." Canadian Counter-Memorial, Annex 27.



66. A clause requiring foreign vessels to comply with both conservation measures and other terms and conditions, which follows closely the wording of the 1982 Convention on the Law of the Sea, is included in almost identical form in all bilateral fisheries agreements concluded by Canada with respect to its 200-mile zone.<sup>89</sup> Canada has not limited itself in the regulation of foreign fishing to matters relating to conservation. Foreign fishing vessels are subject to all conditions established by Canada in exercise of its exclusive right to manage the fishery.

3. The 1972 Agreement does not limit Canada's authority to regulate the French fishery in the Gulf of St. Lawrence to conservation measures only

67. Article 6 of the 1972 Agreement provides that "Canadian fishery regulations" are applicable to the French fishing vessels covered by Articles 3 and 4. France now argues that the preamble to the 1972 Agreement qualifies the meaning of "fishery regulations" in Article 6. This cannot be supported either as a matter of treaty interpretation or on the basis of the actual words used in the preamble.

68. First, as to treaty interpretation, while the preamble may be referred to in order to ascertain the

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<sup>89</sup> Supra, note 86. Canadian Counter-Memorial, Annex 26.



object and purpose of the treaty or for clarification of the meaning of a specific term, it cannot contradict the terms or the manifest purpose of the agreement.<sup>90</sup> France cannot, therefore, use the terms of the preamble to qualify Article 6.

69. Second, in any event, the preamble to the 1972 Agreement does not establish or imply any limitation upon Canada's authority to regulate the fishery undertaken by Saint-Pierre-et-Miquelon trawlers pursuant to Article 4(b). The preamble set out in full provides:

Having regard to the fact that the Canadian Government has deemed it necessary, notably with a view to ensuring the protection of Canadian fisheries, to adopt certain measures relating to the delimitation of the territorial sea and fishing zones of Canada,

Considering it desirable to adapt to present circumstances their mutual relations in fishing matters,

Have agreed as follows ...

70. This provision simply indicates that the need to protect Canadian fisheries was an important factor

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90 Sir Gerald Fitzmaurice: "The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points," British Yearbook of International Law, Vol. 33, 1957, p. 203 at pp. 227-229. At p. 229: "The scope of clear terms in an operative clause conferring a right, or creating a status, cannot be cut down by more restrictive language employed in a preamble." Emphasis in original. Canadian Counter-Memorial, Annex 28.



leading to Canada's adoption in 1970 of measures relating to its territorial sea and fishing zones. In the light of these measures Canada and France had to "adapt" their fishery relations. Of course, the need for conservation was not the only factor that led to the extension of Canadian jurisdiction. Like other coastal States, Canada had to take account of the economic and social needs of its fishermen and of communities dependent on the fishery. The preamble to the 1972 Agreement neither establishes nor implies any limitation either on Canada's right to regulate the fishery in the Gulf of St. Lawrence or on any of the provisions of the Agreement itself. It simply describes some of the reasons for the negotiations that led to the 1972 Agreement.

71. What constitutes "Canadian fishery regulations" within the meaning of Article 6 is well-known to France. These consist of, first, the basic legislative texts, the Territorial Sea and Fishing Zones Act,<sup>91</sup> the Fisheries Act,<sup>92</sup> and the Coastal Fisheries Protection Act;<sup>93</sup> second, the regulations made pursuant to those Acts;<sup>94</sup> and third, the application of

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91 R.S.C. 1970, c. T-7, as amended. Canadian Memorial, Annexes 39 and 47.

92 R.S.C. 1970, c. F-14, as amended. Canadian Memorial, Annex 14.

93 R.S.C. 1970, c. C-21, as amended. Canadian Memorial, Annex 2.

94 Fishing Zones of Canada (Zones 1, 2 and 3) Order, Order in Council P.C. 1971-366, February 25,





the Act and the regulations by the Minister of Fisheries and Oceans, who has a wide discretion in such areas as the issuing of licences.<sup>95</sup>

72. This position has not changed in any significant respect since the conclusion of the 1972 Agreement.<sup>96</sup> It was clear to France in 1972 that processing at sea was within the ambit of the fishery regulations that could be applied to foreign vessels. Section 2 of the Coastal Fisheries Protection Act, defines a "fishing vessel" as "any ship or boat or any other description of vessel used in or equipped for fishing or processing fish or transporting fish from fishing grounds and includes any vessel used or equipped for taking, processing or transporting marine plants."<sup>97</sup>

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1971, SOR/71-81. Canadian Memorial, Annex 9. Atlantic Fishery Regulations, 1985, Order in Council P.C. 1985-3662, December 19, 1985, SOR/86-21. Canadian Memorial, Annex 15. Foreign Vessel Fishing Regulations, C.R.C. 1978, c. 815. Canadian Memorial, Annex 16. Coastal Fisheries Protection Regulations, C.R.C. 1978, c. 413. Canadian Memorial, Annex 3.

<sup>95</sup> Canadian Memorial, para. 22.

<sup>96</sup> The Foreign Vessel Fishing Regulations, supra, note 94, Order in Council P.C. 1976-465, February 26, 1976, SOR/76-168, were enacted in 1976. These Regulations as they appear today are found in the Canadian Memorial, Annex 16.

<sup>97</sup> Emphasis added. This definition has not changed since 1972. Canadian Counter-Memorial, Annex 2. Fisheries regulations of the following countries also define "fishing vessel" specifically to include vessels engaged in processing on board: Australia, Bahamas, Bangladesh, Comoro Islands, (Cont'd on next page)



France could have been under no misapprehension as to both the range of application and the substantive scope of Canadian fishery regulations.

4. The only limitation imposed by the 1972 Agreement on Canada's regulatory authority is the obligation of non-discrimination

73. Article 6 of the 1972 Agreement provides that the application of Canadian fishery regulations to French vessels under Articles 3 and 4 shall be "without discrimination," an obligation that is also inherent in the equal footing principle in Article 4(b).<sup>98</sup> There are two important corollaries that flow, nevertheless, from this obligation of non-discrimination. First, the standard by which discrimination is to be measured is the standard applicable to Canadian trawlers in the Gulf. It was in this sense that the Canadian Memorial described the equal footing provision as a "national treatment" clause.<sup>99</sup> Second, standards are set by Canada, in exercise of its exclusive jurisdiction over the fishery in the Gulf; standards cannot be imposed by France.<sup>100</sup>

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Cook Islands, Gambia, India, Kenya, Nauru, New Zealand, Senegal, Seychelles, South Africa, Tanzania, Tonga, United States of America and Western Samoa. Canadian Counter-Memorial, Annex 29.

<sup>98</sup> Canadian Memorial, para. 78.

<sup>99</sup> Id., paras. 75-76.

<sup>100</sup> Id., para. 79.



**B. The Allegation of Discrimination**

74. France claims that the prohibition of Saint-Pierre-et-Miquelon vessels from filleting in the Gulf is discriminatory on two grounds: no other foreign vessels are so prohibited, and the prohibition is not made applicable to the area outside as well as inside the Gulf. It will be shown that neither of these grounds support this allegation of discrimination.

1. The condition attached to LA BRETAGNE's licence is not discriminatory

75. The question of discrimination cannot arise in the Gulf because with the exception of an insignificant Faroese shark fishery all other foreign vessels have been phased out of the Gulf. In any event, as the Canadian Memorial points out,<sup>101</sup> Article 4(b) provides for equal footing based on national treatment, not treatment based on what is accorded to other States.

76. France also claims that there is discrimination as between Saint-Pierre-et-Miquelon registered vessels and metropolitan registered vessels, in that the latter have not been prohibited from filleting in the Gulf. Such an argument overlooks the differences between the metropolitan fishery under Article 3 and the Saint-Pierre-et-Miquelon fishery under Article 4(b). It

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<sup>101</sup> Canadian Memorial, paras. 75-77.



also uses Canada's concern to ensure that the French fishery in Canadian waters was able to operate effectively as a ground of criticism of Canada's actions.

77. Both Article 3 and Article 4 provide for the continuation of a fishery -- in the case of Article 3 this was a fishery conducted by larger distant-water vessels, including factory freezer trawlers; in the case of Article 4(b) this was a fishery conducted by much smaller vessels of limited range. It was readily understood at the time of the negotiation of the 1972 Agreement that the metropolitan French fishery would include factory freezer trawlers, but that the Saint-Pierre-et-Miquelon trawler fishery under Article 4(b) would not.<sup>102</sup>

78. While in exercise of its exclusive jurisdiction, Canada can regulate or prohibit filleting at sea by metropolitan French vessels within the Gulf of St. Lawrence, it has not done so in view of the nature of the right granted under Article 3, which was to continue a distant-water fishery<sup>103</sup> for a limited period of

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<sup>102</sup> Canadian Memorial, para. 83 and note 116.

<sup>103</sup> The distinction between "the long-distance fleet from France" and "vessels permanently located at St. Pierre and Miquelon" was made in the 1971 negotiations by the French negotiator, M. Girard. "Fisheries Phasing-Out Negotiations: France, First Round of Talks, May 19-21, 1971," p. 2. Canadian Memorial, Annex 43. The exemption of metropolitan vessels from the prohibition of filleting at sea was dealt with in Canadian diplomatic note No. 237 of February 4, 1985. Canadian Memorial, Annex 6, p. 3.





time. To have prohibited metropolitan vessels from filleting in the Gulf would have inhibited the fishery that could be conducted by that fleet, given the distance from their home ports.

79. The same considerations do not apply to Saint-Pierre-et-Miquelon vessels under Article 4(b). The Gulf fishery operated out of Saint-Pierre-et-Miquelon is not a distant-water fishery (see Figure 3), and hence it can be conducted perfectly well on the basis of wetfish trawlers. It stands in relation to the Gulf in the same position as ports on the south coast of Newfoundland, approximately 150 miles from the Gulf.<sup>104</sup> The condition on LA BRETAGNE's licence, which prohibits it from filleting in the Gulf, does not deprive the Saint-Pierre-et-Miquelon trawler fleet of its right to fish under Article 4(b).

80. No question of discrimination between the Saint-Pierre-et-Miquelon fleet and the metropolitan fleet, which in any case must leave the Gulf by May 15, 1986, can arise. Saint-Pierre-et-Miquelon trawlers can only be compared with Canadian trawlers and should receive the same treatment.

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<sup>104</sup> This represents approximately 12 hours (1/2 day) steaming time.



Figure 3

Distance comparée des  
ports aux lieux de pêche

Comparison of  
Distances to Fishing  
Grounds

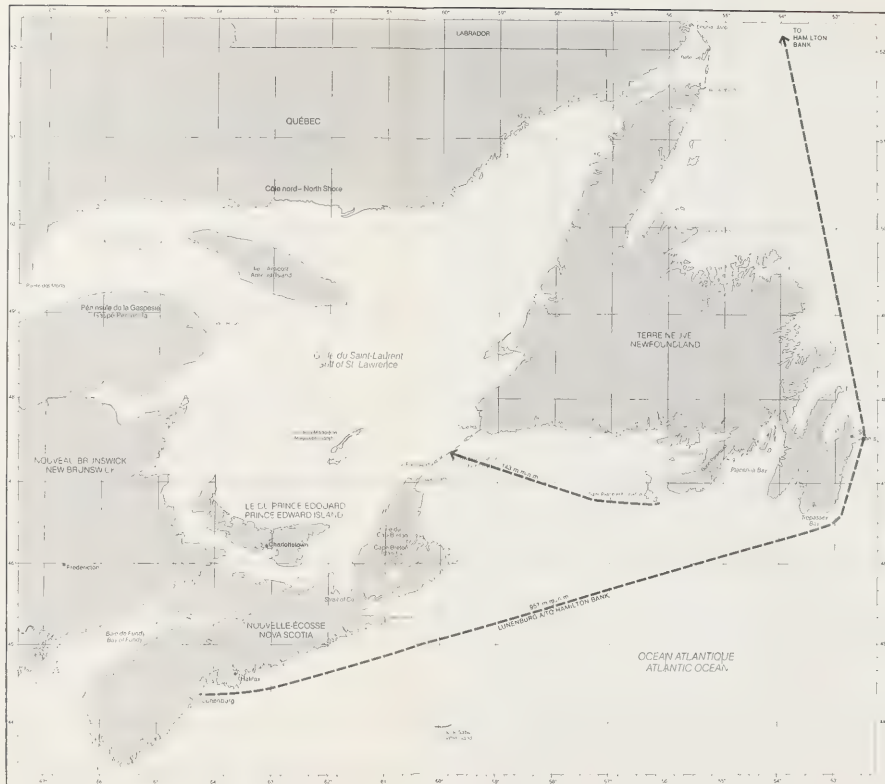
143 m.m.

De Saint-Pierre-et-Miquelon au golfe  
Saint-Pierre-et-Miquelon to the Gulf

507 m.m.

De Lunenburg au Labrador  
(Banc Hamilton)  
Lunenburg to Labrador  
(Hamilton Bank)

m.m. = milles marins  
n.m. = nautical miles





2. The fact that the condition attached to LA BRETAGNE's licence is limited to the Gulf of St. Lawrence also does not constitute discrimination

81. France argues that the fact that LA BRETAGNE is prohibited from filleting at sea inside the Gulf, but is not prohibited from filleting at sea outside the Gulf, constitutes discrimination. It is true that in relation to Canadian vessels LA BRETAGNE receives preferential treatment outside the Gulf. This results from the structure of the 1972 Agreement and in particular from the voisinage arrangement of Article 4.

82. Paragraph (b) of Article 4 provides for special treatment for Saint-Pierre-et-Miquelon within the Gulf of St. Lawrence and within 12 miles of the coasts of Newfoundland and Nova Scotia. This corresponds to the extent of Canadian fisheries jurisdiction claimed in 1972. Within these areas the Saint-Pierre-et-Miquelon trawler fishery was to be treated like a Canadian fishery. Outside the Gulf, beyond 12 miles from the coasts of Newfoundland and Nova Scotia, no special voisinage arrangement was made for Saint-Pierre-et-Miquelon trawlers. The right of the inhabitants of Saint-Pierre-et-Miquelon to fish in the Canadian 200-mile zone, like the right of other French nationals, derives from Article 2 of the 1972 Agreement. In essence, inside the Gulf the Saint-Pierre-et-Miquelon fishery was to be treated like a Canadian fishery; outside the Gulf (beyond 12-miles) the Saint-Pierre-et-Miquelon trawler fishery was to be treated like a foreign fishery.



83. No question of discrimination can arise where France receives equality of treatment within the Gulf, regardless of what it might be permitted to do outside the Gulf. Again, reasonable and generous action by Canada with respect to foreign vessels in its 200-mile zone is used as a ground of criticism by France. In fact, France's claim of discrimination arises because it wants preferential treatment in the Gulf, not equality of treatment. Any discrimination that exists is in favour of Saint-Pierre-et-Miquelon trawlers; Canadian trawlers of an equivalent size are not permitted to operate in the Gulf.<sup>105</sup>

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<sup>105</sup> Since 1981, non-Gulf-based Canadian trawlers over 1050 brake horsepower have been completely excluded from the cod fishery in the Gulf. Canadian Memorial, para. 24.





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**PART V**

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**THE IMPLICATIONS OF THE PROHIBITION OF  
FILLETING IN THE GULF**

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84. In this Part of the Counter-Memorial the Government of Canada will deal with France's contention that filleting at sea constitutes an "évolution inéluctable" in the development of fishing fleets, and with France's arguments regarding Canada's policy relating to factory freezer trawlers. It will demonstrate that the application of Canada's policy to Saint-Pierre-et-Miquelon vessels does not deprive the islands of the right to fish under Article 4(b). The rationale for Canada's policy, which is explained for the convenience of the Tribunal, is not at issue in this arbitration. The only question is whether the application of this policy to Saint-Pierre-et-Miquelon vessels in the Gulf is contrary to the 1972 Agreement.

**A. The Practice of Filleting at Sea**

85. France acknowledges in its Memorial that factory freezer trawlers were developed as a distant water technology; they were used initially "notamment par les Britanniques, les Allemands et les Soviétiques pour exploiter les lieux de pêche éloignés."<sup>106</sup> The Canadian Discussion Paper on factory freezer trawlers points out

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<sup>106</sup> French Memorial, pp. 76-77, para. 96. Emphasis in original.



that the use of factory freezer trawlers "was a choice dictated by the distance to the fishing grounds. In contrast, the Canadian offshore fleet developed on the basis of wetfish trawlers operating in close proximity of fishing grounds."<sup>107</sup> Filleting at sea and wetfish operations are alternative developments -- the former does not inexorably follow the latter in the process of modernization.

1. Modern developments in fishing fleets have included both "wetfish" and "factory freezer" technologies

86. France describes the present-day use of factory freezer trawlers as follows: "le développement du filetage à bord constitue une évolution inéluctable..;" and "la politique suivie par tous les pays pêcheurs de l'Atlantique du nord-ouest s'est donc traduite par une tel développement, progressif et régulier."<sup>108</sup> In support, France relies on the Canadian Discussion Paper<sup>109</sup> which refers to Iceland and Norway, neither of which have significant fisheries in the Northwest Atlantic, and the United States. Moreover, France does

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<sup>107</sup> Discussion Paper on Factory Freezer Trawlers, Department of Fisheries and Oceans, August 1985, p. 3. Canadian Counter-Memorial, Annex 30.

<sup>108</sup> French Memorial, p. 78, para. 98. Emphasis in original.

<sup>109</sup> Id., p. 77, para. 96.



not point out that all of the foreign vessels fishing in Canadian waters (with the exception of Saint-Pierre-et-Miquelon vessels) are operating in a distant water fishery.

87. France's argument about the practice of States generally is not borne out by statistics on the building of fishing vessels which indicate a continued preference for wetfish rather than for factory freezer trawlers. A world-wide survey of the construction of new trawlers over 40 metres in length for the years 1982 to 1984 shows that 8 factory freezer trawlers were constructed, while in the same period there were 28 wetfish trawlers constructed.<sup>110</sup>

88. The essential flaw in France's argument about the need to operate factory freezer trawlers from Saint-Pierre-et-Miquelon is that it fails to take into account the distance from Saint-Pierre to the Gulf (see Figure 3). Where the distance from port to fishing ground is no more than half a day's steaming, the logic of using a factory freezer trawler diminishes,<sup>111</sup> and

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110 Data compiled from annual surveys: "Vessel Completions," World Fishing, Vol. 32, No. 3, March 1983, pp. 27-44; Vol. 35, No. 3, March 1984, pp. 14-27; Vol. 34, No. 3, March 1985, pp. 14-28. In view of their number, these pages have not been reproduced. However, they will be provided to the Tribunal and to the Agent for France if requested.

111 By comparison, steaming time from Lunenburg to the fishing grounds off the coast of Labrador is approximately three days. Op. cit. supra, note 107, Appendix A, p. 5, Canadian Counter-Memorial, Annex 30.



it certainly can never be regarded as necessary. Since there is no argument to be made on the basis of distance, France argues that factory freezer trawlers provide a better quality product.<sup>112</sup> But the product of a factory freezer trawler is not "better" than the product of a wetfish trawler -- it is simply different. It is the care taken in the handling of the product in both catching and processing that determines "quality", and this applies whether the processing takes place at sea or on land.<sup>113</sup>

2. The use of factory freezer trawlers by certain countries reflects considerations particular to their needs

89. The 1985 Canadian Discussion Paper noted that "factory freezer trawlers have recently been introduced by nations which harvest more accessible domestic fishing zones,"<sup>114</sup> citing the examples of Iceland and

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<sup>112</sup> French Memorial, p. 75, para. 93. The order of the sentences from the Canadian Discussion Paper has been rearranged in the extract quoted in the French Memorial and the following statement has been omitted: "On the other hand, other technologies can provide a high quality product, and it is important that we avoid creating negative perceptions regarding the product, say, of wetfish trawlers." Emphasis added. Op. cit. supra, note 107, pp. 14-15. Canadian Counter-Memorial, Annex 30.

<sup>113</sup> Op. cit. supra, note 107, pp. 13-16 and Appendix B. Canadian Counter-Memorial, Annex 30.

<sup>114</sup> Op. cit. supra, note 107, p. 16. Canadian Counter-Memorial, Annex 30.





the United States, and later, Norway. Without apparently relying on any other source France argues that "le Canada, seul parmi les grandes nations industrielles, a marqué une réticence certaine à l'égard des navires fileteurs."<sup>115</sup> However, the examples do not support the curious French thesis of technological determinism. Each of the countries mentioned in the Discussion Paper introduced factory freezer trawlers for reasons relating to distance, species and markets that were particular to their own fishery and not because it considers wetfish trawlers to be obsolete.

90. The factory-freezer trawlers in Norway's fleet were developed for Norway's distant-water fishery and there is no apparent move to have these vessels replace the existing wetfish fleet.<sup>116</sup> Factory freezer trawlers in the Icelandic fleet are generally converted wetfish trawlers which respond to the particular needs of Iceland, including a shortage of labour for on-shore

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115 French Memorial, p. 77, para. 97. Emphasis in original. The French Memorial uses the term "navire fileteur" to designate a factory freezer trawler. The French trade publication La pêchemaritime describes LA BRETAGNE as a "chalutier-usine congélateur." "'La Bretagne', chalutier-usine congélateur de 50m," La pêche maritime, No. 1281, décembre 1984, p. 708. Unofficial translation: "factory freezer trawler." Canadian Memorial, Annex 32.

116 No new factory freezer trawlers were constructed by Norway between 1982 and 1984. Supra, note 110.



processing.<sup>117</sup> Moreover, Icelandic vessels often operate as a distant-water fishery, landing their catch in continental Europe. In the case of the United States, factory freezer trawlers have been introduced on the Pacific coast in what is essentially a distant-water fishery for species not previously utilized.<sup>118</sup> On the Atlantic coast two factory freezer trawlers have been recently brought into the United States fishery for underutilized species,<sup>119</sup> not for traditional groundfish species.

91. Canada accepts that in certain circumstances there are advantages, economic and otherwise, to operating factory freezer trawlers. For this reason, and on a carefully circumscribed basis, Canada has now permitted the operation of a limited number of such vessels in its own fleet. Canada is unaware, however, of any development in international fisheries that would support France's thesis of an "évolution inéluctable"

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<sup>117</sup> H.P. Palsson: The Icelandic Fishing Industry, Department of Fisheries and Oceans, September 1985, p. 9. Canadian Counter-Memorial, Annex 31.

<sup>118</sup> The fishery is conducted from Seattle for cod and pollock in the North Pacific and the Bering Sea off the coast of Alaska. "Two new trawler/processors move north to Alaska," National Fisherman, Vol. 65, No. 2, June 1984, p. 46 at p. 47. "New wave of domestic factory ships wants to play ball," National Fisherman, Vol. 66, No. 3, July 1985, p. 5. Canadian Counter-Memorial, Annexes 32 and 33.

<sup>119</sup> "The Big Boats are Coming ..." and "Smaller-boat fleet sees factory ships as potential threat," National Fisherman, Vol. 66, No. 3, July 1985, p. 2 and p.3. Canadian Counter-Memorial, Annexes 34 and 35.



towards factory freezer trawlers, or of any alleged "développement progressif et régulier" towards a general use of factory freezer trawlers in anything other than distant-water fisheries.

92. Moreover, it is clear that in deciding whether to permit the operation of factory freezer trawlers, a State will take into account a variety of factors, including resource conservation, market requirements, economic efficiency and fairness. In considering such factors States will obviously be concerned with the economic and social well-being of the communities that depend upon the fishery.

**B. Canada's Policy Relating to Factory Freezer Trawlers**

93. France argues that Canada's policy relating to factory freezer trawlers "a toujours été motivée par le souci canadien de 'conservation des emplois à terre' dans les ateliers et usines de traitement du poisson."<sup>120</sup> Such a characterization does not properly reflect Canada's objectives in fisheries management and ignores the part that Canada's general approach to the regulation of the Canadian fishery, particularly in the Gulf, has played in the prohibition of factory freezer trawlers.

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<sup>120</sup> French Memorial, p. 84, para. 101. The words "conservation des emplois à terre" are from the Discussion Paper on Factory Freezer Trawlers, op. cit. supra, note 107, p. 5. Canadian Counter-Memorial, Annex 30.



94. The Government of Canada will explain in this section the factors that conditioned its policy on factory freezer trawlers, the scope of that policy, and the October 1985 modification. It will demonstrate that Canada's policy relating to factory freezer trawlers is a part of its general policy in respect of the offshore fleet. The policy on factory freezer trawlers, which has evolved systematically in the light of changing circumstances in the fishing industry, reflects the desire to manage rationally the living resources of the waters subject to Canada's fisheries jurisdiction.

1. Canada's fisheries policies have been developed against a background of overfishing and depletion of stocks in the Northwest Atlantic due to uncontrolled fishing

95. In the 1950s and the 1960s there was an influx of large distant-water factory fleets into the waters off Canada's coast. At the same time Canadian domestic companies began to acquire small side and stern wetfish trawlers which were operated from ports in relatively close proximity to their fishing grounds. In the mid-1960s they began to replace their smaller side trawlers with larger stern trawlers. Markets were strong and catch levels could be improved with larger, more modern vessels.





96. A decline in catches in the northern waters off Labrador<sup>121</sup> led to a movement of foreign factory freezer trawlers to other grounds where they competed with Canadian trawlers and inshore vessels. This brought additional pressure to bear on stocks off Newfoundland and Nova Scotia and in the Gulf. Not surprisingly, these events have contributed to the negative image which factory freezer trawlers have for many Canadian fishermen, particularly those engaged in the inshore fishery.

2. Canada's policy has been to reserve the Gulf primarily for fishermen operating out of Gulf ports and to exclude larger non-Gulf-based vessels from the Gulf fishery

97. In the early 1970s Canada took a series of measures designed to relieve pressure on stocks. These included the gradual exclusion of foreign vessels from the Gulf and a freeze on the issuing of any new offshore trawler groundfish licences in 1973.<sup>122</sup> The collapse

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<sup>121</sup> The decline is documented in: ICNAF Statistical Bulletin Volumes 10 to 21, Dartmouth, 1962-1972. In view of the number involved, these bulletins have not been reproduced. However, they will be provided to the Tribunal and to the Agent for France if requested.

<sup>122</sup> "New Atlantic Fishing Vessel Licensing Program Under Consideration," August 13, 1973. "Atlantic Fishing Fleet Development Policy Announced," November 14, 1973. Canadian Counter-Memorial, Annexes 36 and 37.



of the redfish stock in the Gulf in 1976,<sup>123</sup> and the consequent insufficient level of quotas for the offshore fleet compared with existing offshore fishing capacity, precipitated the development of the first "management plan" for the Atlantic groundfish fishery. This called, inter alia, for a substantial reduction in the large-vessel fishery in the Gulf.

98. The longer term strategy for the Gulf was to encourage the larger, generally non-Gulf-based vessels, to fish in waters outside the Gulf. A compromise was eventually reached under which the access of these larger vessels was reduced, although the older vessels based outside the Gulf, which because of their construction and horsepower limitations would have difficulty travelling to alternative grounds, were permitted to continue to fish in the Gulf.<sup>124</sup> The underlying tenets of Canadian policy included adjacency (where possible vessels should be able to fish near their ports), mobility (more mobile vessels should be permitted, and required, to fish further afield), and fairness (policies would be modified to take account of hardship). As far as the Gulf was concerned, the general approach was that those inside should have priority, but at the cost of losing access to stocks outside the Gulf. Outsiders were to be progressively excluded from the Gulf. This

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<sup>123</sup> Canadian Memorial, para. 54.

<sup>124</sup> The dividing line of 1050 brake horsepower was used to distinguish the different groups of vessels. See Canadian Memorial, para. 24 and note 31.



responded to the particular concerns of Gulf-based fishermen who objected to the fact that non-Gulf-based vessels could engage in a winter fishery in the mouth of the Gulf while Gulf-based vessels were ice-bound in their home ports.<sup>125</sup>

3. Canada's approach to the licensing of factory freezer trawlers has been primarily motivated by the general policy of controlling the capacity of the offshore fleet

99. The policy of preventing growth in the off-shore groundfish fleet was maintained even with the extension by Canada of fisheries jurisdiction out to 200 miles, while the inshore fleet was permitted to grow back to the levels that existed before the major stock declines of the 1960s and the 1970s.<sup>126</sup> Consistent with its general policy with respect to the offshore fleet, Canada's policy regarding factory freezer trawlers was designed to prevent growth in fishing capacity. It was not sufficient simply for Canada to

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<sup>125</sup> Canadian Memorial, para. 17 and Figure 4.

<sup>126</sup> The granting of inshore licences was not restricted until 1980: "Moratorium Imposed on Groundfish Licences," March 14, 1980. Canadian Counter-Memorial, Annex 38.



set quotas for the fleet.<sup>127</sup> If capacity was allowed to increase, pressure for higher quotas would grow. This would only lead to increased difficulty in managing the fishery and to overfishing.

100. The desire to restrain increases in fishing capacity was the determining factor in the denial of the first application by National Sea Products Limited for a licence to operate a factory freezer trawler.<sup>128</sup> The fishery resources were not sufficient for the needs of the existing fleet sectors and additional offshore capacity could not be supported. Where species were underutilized, and where the problem of excess capacity accordingly did not exist, there was no need to take a similar approach. Thus, a licence was issued for a vessel on the west coast of Canada for the harvesting of underutilized species.<sup>129</sup>

101. These two elements of Canada's approach -- the denial of licences for the harvesting of traditional groundfish species by factory freezer trawlers, and the

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<sup>127</sup> France argues that Canada need not be concerned with increases in capacity because it sets quotas. French Memorial, p. 89, para. 103.

<sup>128</sup> Op. cit. supra, note 107, p. 4. Canadian Counter-Memorial, Annex 30.

<sup>129</sup> The French Memorial, (p. 77, para. 97), refers to this vessel, the CALLISTRATUS, which received a licence in 1979 to fish for underutilized species off the Pacific coast of Canada. Op.cit. supra, note 107, p. 4. Canadian Counter-Memorial, Annex 30.





approval of licences for the harvesting of non-traditional or underutilized species by factory freezer trawlers -- were set out clearly by the Minister of Fisheries in 1979 in the statement referred to in Canada's Memorial.<sup>130</sup> That statement was part of a broader policy statement which outlined the fundamental elements of Canadian fisheries management. Although a limited degree of flexibility was to be afforded to companies in terms of replacing existing vessels, the overall intent was clearly to minimize increases in offshore capacity.

102. The impact of factory freezer trawlers upon the shore-based processing industry has also been a factor in the formulation and maintenance of the Canadian policy, which has generally attracted a good deal of public attention.<sup>131</sup> But it was neither the

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<sup>130</sup> "Set Policy for Licensing Freezer Trawlers," November 30, 1979. Canadian Memorial, para. 25 and Annex 20. In 1980 four licences were approved in respect of non-traditional species. Only two licences were issued and the fishery was not continued after 1980. The licences did not permit the filleting at sea of traditional groundfish species. Information provided by the Canadian Department of Fisheries and Oceans.

<sup>131</sup> The concern about onshore processing was referred to in official statements made when the modification to Canada's policy was announced. "Statement by the Honourable John C. Crosbie, Minister of Justice and Attorney General re the Factory Freezer Trawler Licences," November 8, 1985. Canadian Memorial, Annex 22. Supra, note 107, pp. 5, 19-22 and 30. Canadian Counter-Memorial, Annex 30.



motivating factor for Canada's policy, nor the determining factor in its continuation, as the French Memorial implies.<sup>132</sup> Canada's concern has been the rational use of the groundfish resource; in this regard Canada has sought to regulate an offshore fleet where catch potential is in excess of the capacity of the resource. In other words, Canada's concern has been to avoid further increases in fishing capacity that lead to pressure for higher quotas with the consequences that this would entail.

4. Canada's recent modification to its factory freezer trawler policy is a response to particular circumstances

103. In 1982 an "enterprise allocation" system<sup>133</sup> was developed for the Canadian offshore fleet in order to reduce competitive fishing among Canadian companies. This system grants a specific quota to each company, thus allowing it to determine its fishing plan without having to fish in competition with other companies as it had to do when an overall fleet quota was set<sup>134</sup>. This has led to a decline in the absolute number of offshore trawlers, because companies are able to plan their fishing more efficiently. Enterprise allocations have

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<sup>132</sup> French Memorial, p. 84, para. 101.

<sup>133</sup> Canadian Memorial, para. 23.

<sup>134</sup> The enterprise allocation scheme was refined by government and industry from 1982 to 1984, and was extended on a long-term trial basis from 1985 to 1989.



provided an incentive for each company to control its own fishing capacity. This has made it possible to contemplate the modification of Canada's factory freezer trawler policy.<sup>135</sup>

104. A new request in 1985 from National Sea Products Limited for a factory freezer trawler licence prompted a reappraisal of the Canadian policy. Several significant factors emerged.<sup>136</sup> First, the National Sea application was directed mainly at the harvesting of Northern cod off Labrador, some 950 nautical miles from National Sea's home port of Lunenburg; in effect this was a request for a licence to carry out a distant-water fishery (see Figure 3).<sup>137</sup>

Second, National Sea's application was also related to allocations which it was not able to utilize fully with

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<sup>135</sup> In 1981, a National Sea Products Limited application for a licence to operate a factory freezer trawler was turned down because the addition of such a vessel would have allowed the company to increase its catch of the offshore quota and thus have created difficulties in the implementation of the enterprise allocation scheme. Op. cit. supra, note 107, p. 6. Canadian Counter-Memorial, Annex 30.

<sup>136</sup> These factors are dealt with in the Canadian Discussion Paper supra, note 107 passim, Canadian Counter-Memorial, Annex 30; and in "Three Factory Freezer Trawlers Licences Approved," November 8, 1985, Canadian Memorial, Annex 21.

<sup>137</sup> The round trip steaming time from Lunenburg to the fishing grounds off Labrador (Hamilton Bank) is approximately six days. Op. cit. supra, note 107, Appendix A, p. 5. Canadian Counter-Memorial, Annex 30.



wetfish trawlers, primarily because of the nature of the species, distance, and particular market requirements. Third, the problems of increased capacity would be avoided if a factory freezer trawler were to replace equivalent capacity wetfish trawlers, and if the vessel was to operate within existing enterprise allocations.

105. The modification of Canada's policy in order to allow three factory freezer trawler licences to be issued for a 5-year period involved recognition of the distant-water character of part of Canada's fishery. It was accomplished without placing increased pressure on stocks. Although only one licence had been requested, in accordance with the principle of fairness (identified earlier as one of the governing principles of Canadian fisheries management) three licences were made available in order to allow competing companies an equal opportunity to operate factory freezer trawlers. Only one licence has been issued so far.<sup>138</sup>

106. As pointed out in the Canadian Memorial,<sup>139</sup> conditions attached to the issuing of these licences seek to deal with the problems that in the past have led to a refusal of factory freezer trawler licences. In addition, these conditions are designed to avoid conflict between the operators of factory freezer trawlers and other fishermen. Thus, the conditions reflect both

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<sup>138</sup> That licence was issued for the CAPE NORTH owned by National Sea Products Limited. Information provided by the Department of Fisheries and Oceans.

<sup>139</sup> Canadian Memorial, para. 26.





long-term conservation factors as well as economic and social considerations relating to the Canadian fishery. In order to operate a factory freezer trawler, National Sea was required to retire an equivalent amount of fishing capacity from its existing fleet, and the operation of the vessel is limited to areas where it is forecast that stocks will increase or remain stable, or where there are significant underutilized enterprise allocations. This means that stocks off northern Newfoundland and Labrador (which is a distant-water fishery for vessels from Nova Scotia) will be the major focus for the fishery. National Sea also had to provide guarantees about the preservation of employment in order to avoid dislocation in processing plants on shore.

5. The continuation of the exclusion of the Gulf from the area of operation of factory freezer trawlers conforms with Canada's policy of limiting access to the Gulf by large capacity vessels

107. One of the conditions under which the new licences are to be issued is that these factory freezer trawlers are not to be permitted to operate in the Gulf of St. Lawrence or in the Bay of Fundy. In Questions and Answers attached to the policy announcement it was noted that the Gulf of St. Lawrence and the Bay of Fundy

have their own particular problems and have always been managed separately in the light of their own needs. In particular



we have consistently sought to avoid any increase in large capacity vessels in these waters.<sup>140</sup>

108. Canada's policy has been to exclude large capacity vessels from the Gulf groundfish fishery, and particularly from the Gulf cod fishery. The excluded vessels have generally been based outside the Gulf. There are currently only 12 vessels over 100 feet (30.48 m) based in the Gulf that are licensed to fish in the Gulf cod fishery. Non-Gulf-based vessels over 1050 b.h.p. have been excluded from that fishery since 1981.<sup>141</sup> To have allowed access to the Gulf to a vessel operating under a new factory freezer trawler licence would have run counter to the whole trend of Canadian fisheries management in the Gulf. It would have led to claims for higher quotas for such vessels and rekindled conflicts between the inshore and offshore sectors of the Canadian fleet.

109. To say that Canada could have let the newly authorized factory freezer trawlers into the Gulf and managed any difficulties simply by setting quotas ignores the reality of fisheries management, including the competing interests of different fleet sectors, all of which claim a right to an economic return from the resource. The setting of quotas by Canada<sup>142</sup> takes place within a broader framework of measures designed to con-

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<sup>140</sup> "Factory Freezer Trawlers: Questions and Answers," no. 6. Canadian Memorial, Annex 21.

<sup>141</sup> Canadian Memorial, paras. 19 and 24.

<sup>142</sup> Canadian Memorial, para. 23.



trol demands on the resource. These include the exclusion of certain types of vessels from particular waters which has long been a central feature of Canadian fisheries management.<sup>143</sup> Canada manages its fishery through a consensual process of consultation with the affected Canadian interests. France's suggestion that Canada should simply act in an arbitrary fashion and ignore the views of fishermen in the Gulf<sup>144</sup> would destroy the basis of cooperation and trust that is essential and would undermine Canada's management of the Gulf fishery.

6. The exclusion from the Gulf of factory freezer trawlers registered in Saint-Pierre-et-Miquelon is necessary for the effective management of the Gulf fishery

110. The principle of equal footing in Article 4(b) mirrors the principle of fairness in Canadian fisheries management. On that basis alone the Saint-Pierre-et-Miquelon fishery, which is to be treated like a Canadian fishery, cannot be conducted in a manner not permitted to Canadians. Unlike the metropolitan fishery in the Gulf, whose term was fixed, the Saint-Pierre-et-Miquelon fishery continues alongside the Canadian fishery. Inequality of treatment causes resentment which would upset the consensual basis on which the Canadian fishery is

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<sup>143</sup> For example, the trawler exclusion rule (see Canadian Memorial, para. 48, note 79) has been in effect since 1929.

<sup>144</sup> French Memorial, pp. 85-86, para. 102.



managed. Privileges and exemptions are disruptive factors in fisheries management. In this regard, Canada is not denying to France on the basis of Canadian public opinion a right to which it is entitled. Rather, France is suggesting that Canada ignore the views and interests of its own citizens in order to give French nationals a "right" to which they are not entitled, that is, privileged treatment in the Gulf of St. Lawrence.

111. France also suggests that Canada need not be concerned about increases in fishing capacity from LA BRETAGNE or other factory freezer trawlers. There is no necessary relation, France says, between filleting at sea and fishing capacity.<sup>145</sup> This statement does not take account of the obvious differences between a wetfish trawler and a factory freezer trawler. Since filleting at sea results in only a portion of the whole fish being retained, a factory freezer trawler can remain at sea longer and need make fewer trips back to port. The Canadian Discussion Paper treated factory freezer trawlers as having at least twice the fishing capacity of wetfish trawlers and this was taken into account in the modification of Canada's policy.<sup>146</sup> The

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<sup>145</sup> Id., p. 89, para. 103.

<sup>146</sup> Op. cit. supra, note 107, Appendix A, pp. 12 and 15. Canadian Counter-Memorial, Annex 30.





vessel now operating under one of the three available factory freezer trawler licences has a significantly greater fishing capacity than Canadian vessels currently operating in the Gulf cod fishery.<sup>147</sup>

112. As far as LA BRETAGNE is concerned, France itself in its Memorial states that LA BRETAGNE's catch in the Gulf would be at least twice the amount that is currently taken in the Gulf by each Saint-Pierre-et-Miquelon wetfish trawler.<sup>148</sup> And France claims that Article 4(b) permits it to operate ten of these vessels in the Gulf.<sup>149</sup>

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<sup>147</sup> One of the conditions for the issuance of a licence to operate a factory freezer trawler is that the company concerned must retire or convert equivalent length and capacity from its present fleet. Op. cit. supra, note 136, p. 3. Canadian Memorial, Annex 21. On this basis, National Sea Products Limited has retired five trawlers from its offshore fleet. Information provided by the Department of Fisheries and Oceans.

<sup>148</sup> In its Memorial, France states that LA BRETAGNE would catch up to 3000 tonnes of cod a year in the Gulf, within the framework of the annual allocations under the 1980 Procès-Verbal (p. 82, para. 100). The existing Saint-Pierre-et-Miquelon wetfish trawlers have each averaged less than half this catch annually. Canadian Memorial, para. 30 and Annex 28.

<sup>149</sup> According to Interpêche, LA BRETAGNE is intended to be the first of a fleet of similar vessels based in Saint-Pierre. "Procès Verbal de l'Assemblée Générale Mixte Ordinaire et Extraordinaire du 28 décembre 1982." Canadian Counter-Memorial, Annex 39.



113. In the exercise of its exclusive fisheries jurisdiction, Canada has determined that the operation of factory freezer trawlers in the Gulf would be inimical to the proper management of the Gulf fishery. Just as it is not for Canada to determine the appropriate method for France to conduct its fishery in its own waters, equally it is not for France to dictate how Canada manages the fisheries subject to Canada's exclusive jurisdiction. Yet in this case France wants its economic and social policies to dictate Canada's fisheries management in the Gulf -- in effect, to have its interests determine not only Canada's conservation policies but Canada's economic and social policies as well. Canada's policies are not at issue in this arbitration. Whether these policies, which are formulated in the light of Canada's own domestic economic, social and political considerations, are right or wrong is not the question. Whether France has been treated on an equal footing in accordance with Article 4(b) of the 1972 Agreement is the real matter at issue.

**C. The Impact of the Prohibition of Filleting  
in the Gulf on Saint-Pierre-et-Miquelon**

1. The right of Saint-Pierre-et-Miquelon  
registered trawlers to fish in the Gulf under  
Article 4(b) remains unimpaired

114. France's claim that the prohibition of filleting in the Gulf deprives LA BRETAGNE and Saint-Pierre-et-Miquelon trawlers generally of their right to fish under Article 4(b) is based upon its view that the development of filleting at sea constitutes "une évolution inéluctable," and that the denial of filleting in



the Gulf prevents all modernization of the Saint-Pierre-et-Miquelon fleet. This Counter-Memorial has shown that the "évolution inéluctable" thesis cannot be sustained.<sup>150</sup>

115. The right to fish under Article 4(b) can be exercised by conventional trawlers, as has been the case since 1972. Indeed, as the Canadian Memorial has pointed out, operating as a wetfish trawler in the Gulf, LA BRETAGNE would provide benefit to the islands, and not just to metropolitan France, thus promoting the very object of Article 4.<sup>151</sup> No comparable benefit for Saint-Pierre-et-Miquelon has been shown to exist from the operation of LA BRETAGNE as a factory freezer trawler in the Gulf.

116. The relegation of Saint-Pierre-et-Miquelon to the background in France's argument is not accidental. As long as the trawler fishery under Article 4(b) remains a genuine Saint-Pierre-et-Miquelon fishery, operated out of Saint-Pierre by the inhabitants of the islands for their benefit, then a prohibition on the operation of factory freezer trawlers in the Gulf in no way impairs the right to fish under Article 4(b). Factory freezer trawlers are necessary, however, in a fishery operated essentially from metropolitan France with only a nominal connection with the islands of Saint-Pierre-et-Miquelon through the fact of registration. It is in order to maintain or develop

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<sup>150</sup> Supra, paras.86 to 92.

<sup>151</sup> Canadian Memorial, paras. 86 and 96.



such a fishery that France argues that the loss of the opportunity to operate factory freezer trawlers in the Gulf deprives it of its right to fish under Article 4(b).

2. France has produced no evidence of any economic or other reason that makes it necessary for factory freezer trawlers registered in Saint-Pierre-et-Miquelon to operate in the Gulf

117. France advances no reason to indicate why it is necessary for LA BRETAGNE to operate as a factory freezer trawler inside the Gulf rather than outside. As the Canadian Memorial pointed out, more than half of the catch of the Saint-Pierre-et-Miquelon trawlers is taken outside the Gulf<sup>152</sup> where LA BRETAGNE has been filleting since 1984, apparently with quite satisfactory results.<sup>153</sup> There is no reason, therefore, why LA BRETAGNE's operations should not continue to take place outside the Gulf.

118. In any event, none of the arguments advanced by France advocating factory freezer trawlers in place of wetfish trawlers leads to the conclusion that factory freezer trawlers must be permitted to operate in the Gulf rather than in waters outside the Gulf. Indeed,

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<sup>152</sup> Id., para. 30.

<sup>153</sup> Institut d'émissions des départements d'Outre-Mer: Saint-Pierre & Miquelon, p. 7.  
Canadian Memorial, Annex 35.





Canada has difficulty in understanding the rationale for operating a factory freezer trawler on fishing grounds that are no more than one hundred and fifty to two hundred miles from its home port.

119. France refers to the superior economic viability of factory freezer trawlers,<sup>154</sup> and describes the existing Saint-Pierre-et-Miquelon trawlers as "vieux" and "de conception ancienne." In the light of its argument that the development of filleting at sea constitutes an "évolution inéluctable," France appears to foresee the replacement of the Saint-Pierre-et-Miquelon wetfish trawler fleet by a fleet of factory freezer trawlers. Yet France does not refer to the obvious implications that this would have for the inhabitants of Saint-Pierre-et-Miquelon.

120. There is apparently no intention to crew LA BRETAGNE from Saint-Pierre-et-Miquelon<sup>155</sup> and, as the Canadian Memorial pointed out, LA BRETAGNE provides no employment on shore in the processing plant in Saint-Pierre.<sup>156</sup> The importance of on-shore processing employment to the islands, which was emphasized recently

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<sup>154</sup> French Memorial, p. 75, para. 94; p. 88, para. 103.

<sup>155</sup> According to Interpêche, LA BRETAGNE "serait armé par un équipage de grande pêche métropolitain." Unofficial translation: "would be manned by a crew from the metropolitan distant-water fishery." Op. cit. supra, note 149. Canadian Counter-Memorial, Annex 39.

<sup>156</sup> Canadian Memorial, para. 96.



in the weekly Saint-Pierre-et-Miquelon newspaper L'Echo des Caps,<sup>157</sup> was noted in the French Memorial.<sup>158</sup> But if France were to replace its wetfish trawlers with a fleet of factory freezer trawlers this would only stifle what France itself has described as "la seule entreprise de quelque importance de l'archipel."<sup>159</sup>

121. It is, of course, for France to explain its policies and their effects on employment to the inhabitants of Saint-Pierre-et-Miquelon. For Canada, France's argument about the necessity for the Saint-Pierre-et-Miquelon trawler fleet to be able to fillet in the Gulf appears to be no more than an argument about the continuation of the metropolitan French fleet in the Gulf notwithstanding its phasing-out in accordance with Article 3. France is claiming, in effect, a right to reintroduce essentially the same fleet under Article 4(b) -- the only difference being that the vessels would be less than 50 metres in length. That is an obligation Canada never intended to assume, nor did it agree to do so in the 1972 Agreement.

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<sup>157</sup> The report concerned the arrival in Miquelon of the new wetfish trawler, LE MARMOUSET. "La Miquelonnaise," L'Echo des Caps, No. 187, February 14, 1986, p. 4. Canadian Counter-Memorial, Annex 40.

<sup>158</sup> French Memorial, p. 76, para. 95.

<sup>159</sup> Ibid.



## PART VI

### SUMMARY OF PRINCIPAL CONCLUSIONS

122. The principal conclusions advanced in this Counter-Memorial may be summarized as follows:

1. France's rights in the Gulf of St. Lawrence derive solely from the 1972 Agreement. Previous French fishing rights in the Gulf are irrelevant; they were renounced in Article 1 of the Agreement.
2. The primary purpose of the 1972 Agreement was to phase French vessels out of the Gulf. Article 4(b) constituted a special exception for Saint-Pierre-et-Miquelon trawlers.
3. Article 4(b) was a voisinage arrangement, designed to benefit Saint-Pierre-et-Miquelon. The trawlers referred to in that article were given a right to continue, on an equal footing with Canadian trawlers, their limited fishery.
4. Canada's right to regulate the fishery in the Gulf of St. Lawrence flows from its sovereignty and its exclusive jurisdiction over the fishery in the Gulf.
5. Canada's authority to regulate the fishery in order to achieve economic and social as well as conservation objectives is recognized under international law.



6. The 1972 Agreement limits Canada's regulatory authority only by the obligation not to discriminate. No discrimination exists in the application to Saint-Pierre-et-Miquelon vessels of a prohibition imposed on Canadian vessels.

7. The use of factory freezer trawlers depends on particular circumstances, such as distance from fishing grounds, and is not part of an "évolution inéluctable" in the modernization of fishing fleets.

8. Canada's policy in relation to factory freezer trawlers reflects Canada's general policy regarding the offshore fleet which is primarily concerned with controlling fishing capacity. Canada's policies are not at issue in this arbitration.

9. France has adduced no evidence of any economic or other disadvantage suffered by Saint-Pierre-et-Miquelon from the prohibition of filleting in the Gulf. France's right to fish in the Gulf under Article 4(b) is unimpaired by the condition attached to LA BRETAGNE's licence.

10. France has advanced no reason to support its claim to privilege in the Gulf. There is no justification for according France preferential treatment, rather than treatment on an equal footing as required by Article 4(b).





PART VII

SUBMISSIONS

In view of the facts and arguments set out in the Canadian Memorial and in this Counter-Memorial, the Tribunal is requested to adjudge and declare:

- (a) that Saint-Pierre-et-Miquelon registered trawlers engaged in the Gulf fishery pursuant to Article 4(b) of the 1972 Agreement are entitled to be treated by Canada on an equal footing with Canadian trawlers but are not entitled to preferential treatment;
- (b) that Article 4(b) provided for the continuance of only a limited Saint-Pierre-et-Miquelon fishery in the Gulf exercised in a way that would benefit the inhabitants of Saint-Pierre-et-Miquelon;
- (c) that LA BRETAGNE does not have the right to operate as a factory freezer trawler in the Gulf of St. Lawrence.

April 22, 1986

Philippe Kirsch  
Agent for the Government  
of Canada



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